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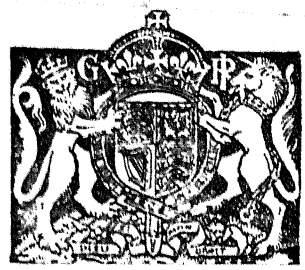

THE
INDIAN LAW REPORTS

ALLAHABAD SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT

REPORTED BY:

Privy Council ... ... A. M. TALBOT, *Inner Temple.*

High Court, Allahabad ... B. K. MUKERJEE, M.A., LL.B., *Advocate, High Court.*

MUKHTAR AHMAD, B.A., LL.B., *Advocate, High Court.*

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JUDGES OF THE HIGH COURT OF JUDICATURE AT ALLAHABAD

1933

Chief Justice :

The Hon'ble SIR SHAH MUHAMMAD SULAIMAN.
(On deputation to the Government of India, Army Department, up to the 18th of February)

Acting Chief Justice :

The Hon'ble SIR LAL GOPAL MUKERJI.
(Officiated up to the 18th of February)

Judges :

The Hon'ble JUSTICE SIR LAL GOPAL MUKERJI.

The Hon'ble MR. JUSTICE CHARLES HENRY BAYLEY KENDALL.

The Hon'ble MR. JUSTICE JOHN DOUGLAS YOUNG.

The Hon'ble MR. JUSTICE CARLETON MOSS KING.

The Hon'ble MR. JUSTICE JOHN GIBB THOM.

The Hon'ble MR. JUSTICE NIAMAT-ULLAH.

The Hon'ble MR. JUSTICE EDWARD BENNET.

The Hon'ble MR. JUSTICE BARTHOLD SCHLESINGER KISCH.
(On leave from the 17th of July to the 27th of October)

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CORRIGENDA

Page 2, line 27, after the word "Council" *insert* the word "in".

Page 112, foot-note *for* "(25)" *read* "(1) (1925)".

Page 121, foot-note, *for* "Apeal" *read* "Appeal" and *for* "subodinate" *read* "subordinate".

Page 153, margin, *for* "32" *read* "1932".

Page 173, line 21, *for* "1828" *read* "1928".

Page 205, foot-note, *insert* "(1)" *before* "(1925)".

Page 232, line 10, *insert* the word "in" *after* the word "nullity".

Page 262, line 6, *insert* the figure "41" *before* the word "All.".

Page 323, line 2 from bottom, *read* "instances" *for* "instance".

Page 392, margin, *for* "1932" *read* "1933".

Page 406, foot-note, line 1, *for* "1930" *read* "1932".

Page 436, line 3, *for* the figure "8" *read* "9".

Page 437, line 10, *for* "and" *read* "any".

Page 490, margin, *for* "Februar" *read* "February, 24".

Page 506, margin, *insert* the figure "1933" at top.

Page 540, line 19, *for* "or human" *read* "for human".

Page 589, margin, *for* the figure "933" *read* "1933".

Page 598, margin, *for* the figure "933" *read* "1933".

Page 641, margin, *for* the figure "193" *read* "1933".

Page 711, line 7 from bottom, for "*Chana*" read "*Chand*".

Page 724, margin, *for* the figure "933" *read* "1933".

Page 788, line 3, *for* "fradulently" *read* "fraudulently".

Page 788, line 5, *for* "fradulent" *read* "fraudulent".

Page 892, margin, *for* the figure "3319" *read* "1933".

Page 897, line 19, *for* "metailed" *read* "motalled".

Page 906, margin, *read* "1933" "Shiam Lal".

Page 912, line 9 from bottom, for "*Behani*" read "*Behari*".

Page 913, margin, delete "*Sulaiman, C. J.*"

Page 914, margin, delete "*Sulaiman, C. J.*"

Page 1014, line 24, *for* "suport" *read* "support".

Page 1043, line 16, *for* "before" *read* "at".

Page 1082, line 12, from bottom, *for* "tha" *read* "that".

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THE
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FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King

AMREJ SINGH AND OTHERS (PLAINTIFFS) *v.* SHAMBHU SINGH AND OTHERS (DEFENDANTS)*

1932
July, 8

Hindu law—Joint family property—Alienation—Mortgage for payment of a pre-emption decree—Acquisition of new property—Legal necessity—"Benefit to the estate"—Whether benefit of a defensive nature only is meant.

Two brothers, who were the adult members of a joint Hindu family, mortgaged the family property in order to raise money for payment on a decree obtained by them for pre-empting some other property. A suit to enforce the mortgage was brought against one brother and the minor sons of the other brother who had died. The question was whether the mortgage was justified by Hindu law and binding on the family property. The findings were that the acquisition of the new property, by borrowed money, was not justified by legal necessity and was not for the benefit of the family and the family estate. *Held*, by the Full Bench, that the mortgage was not binding on the joint family property.

No question of antecedent debt arose in the case, as money which is payable on a decree for pre-emption is not a debt at all.

On the question as to whether and how far a mortgage of joint family property by the manager, for the purpose of acquisition of new property, is justifiable on the ground that such acquisition is for the benefit of the estate, *Held*—

Per SULAIMAN, C. J.—Where the acquisition of the new property was not speculative, but in the best interests of the family and for its benefit as well as for the benefit of the

* First Appeal No. 501 of 1928, from a decree of Charu Deb Banerji, Subordinate Judge of Azamgarh, dated the 12th of June, 1928.

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family estate, which an ordinary prudent manager would make, it would be open to a court to hold that the transaction is binding on the other members of the family, even though it is the raising of a loan on a mortgage of family property for the sake of satisfying a pre-emption decree. The question is in all cases a mixed question of law and fact, and the answer to it must depend on the special circumstances of each case. The authority of *Jagat Narain's* case (1) has not been shaken by the Privy Council decision in *Benares Bank* case (2).

Per MUKERJI, J.—The law relating to the power of the manager of a joint Hindu family to make alienations of the family property, as laid down by the Privy Council in *Hunooman Persaud's* case (3), is the same law as is laid down in verses 27 to 29 of chapter I, section 1, of the Mitakshara. The right interpretation of the phrase "benefit of the estate", used by the Privy Council in the judgment in that case, must be that the benefit is to be of the same nature as the illustrations thereof given in that judgment, i.e. the benefit is to be of a protective or defensive character, by way of removing a pressure or averting a danger threatening the estate; and this interpretation would be in accordance with the Mitakshara, and also in consonance with the law as stated in *Brij Narain's* case (4). There is nothing to indicate that the Privy Council was contemplating any case in which benefit was to be conferred by adding more property to the family, by alienating or by mortgaging the existing property. The decision of the Privy Council *Benares Bank* case (2) has entirely destroyed the authority of *Jagat Narain's* case (1).

Per KING, J.—There can be circumstances in which the acquisition of new property, by pre-emption or otherwise, can be held to be justified by legal necessity. Also, in certain circumstances it may be held that such acquisition was a beneficial and prudent act such as would justify a mortgage of joint family property by the manager. But the facts showing that the transaction was beneficial and prudent must be proved; the acquisition of new property, with money raised upon a mortgage, need not necessarily be of benefit to the estate. In view of the findings in the present case, the question did not arise as to whether the expression "for the benefit of the estate" used in *Hunooman Persaud's* case (3) should be given a very restricted meaning so as to apply only to transactions of a "defensive" nature. The

(1) (1928) I. L. R., 50 All., 969.
(2) (1932) I.L.R., 54 All., 564.
(3) (1856) 6 Moo. I.A., 393.
(4) (1923) I.L.R., 46 All., 95.

authority of *Jagat Narain's* case (1) has not been shaken by the Privy Council decision in *Benares Bank* case (2).

This case was referred by the Division Bench hearing it to a Full Bench. The following was the referring order :—

SULAIMAN, C. J., and YOUNG, J. :—This is a plaintiffs' appeal arising out of a suit for sale on the basis of a mortgage deed executed by the father of defendants Nos. 1 to 3 and by defendant No. 4.

It appears that the executants obtained a pre-emption decree conditional on payment of Rs.3,000. They appear to have had Rs.1,000 in their hands but stood in need of borrowing an additional sum of Rs.2,000 in order to deposit the decretal amount. This amount was borrowed under the mortgage deed in suit. The whole amount was deposited and possession of the pre-empted property was taken. This property is in the possession of the defendants.

The defendants pleaded that the mortgage deed was without legal necessity and was not binding on the other members of the family.

The learned Subordinate Judge following two cases of this Court has held that it is not open to a father governed by the Mitakshara law to encumber joint ancestral property to acquire necessary funds to pre-empt other properties, and has also held that it cannot be argued that there is a benefit by the loan, because purchase by pre-emption by borrowing money is no benefit to the estate. In the view that there is "no legal necessity and no benefit of the estate" he has held that the loan cannot be binding on the joint ancestral property. There is no doubt that his finding is mainly influenced by the rulings which he has quoted.

The point urged in appeal is that the money borrowed by the father to pay the amount due under the pre-emption decree justified the alienation of the joint ancestral property as the transaction was for the benefit of the estate and has in effect benefited the family; and that the defendants cannot keep the property so acquired and yet repudiate the loan taken for its acquisition.

On this point there is a clear conflict of opinion between the decisions in *Nathu* v. *Kundan Lal* (3) and *Kapildeo* v. *Thakur Prasad* (4) on the one hand, and *Shankar Sahai* v. *Bechu Ram* (5) and *Kishen Sahai* v. *Raghunath Singh* (6) on the other

(1) (1928) I.L.R., 50 All., 969.
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(3) (1910) I.L.R., 33 All., 242.
(4) (1913) I.L.R., 36 All., 17.
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hand. The case relied on in the last two mentioned cases was that of *Inspector Singh* v. *Kharak Singh* (1), which was doubted in the case of *Rattan Chand* v. *Sri Thakur Ram Kishan Murarji* (2) and overruled on one point in the case of *Jagat Narain* v. *Mathura Das* (3). The case of *Niladri Sahu* v. *Mahant Chaturbhuj Das* (4) is also relied upon on behalf of the plaintiffs as showing that a benefit is sufficient even if there were no legal necessity.

We think that there is a conflict of opinion which requires to be set at rest one way or the other. We accordingly direct the case to be laid before the Chief Justice for the constitution of a larger Bench.

Messrs. *P. L. Banerji* and *H. P. Sen*, for the appellants.

No one appeared for the respondents.

MUKERJI, J. :—This case has been referred to the Full Bench. The facts briefly are as follows. Two brothers, Tulshi Prasad Singh and Deonath Singh, brought a suit for pre-emption, being suit No. 140 of 1917, against Tilakdhari Singh and others. The suit was decreed on condition of payment of Rs.3,000 as the purchase money to the vendees. The brothers had no money except a sum of Rs.1,000 and they raised the balance of Rs.2,000 by mortgaging their ancestral property to some of the plaintiffs and predecessors of others in the suit out of which this appeal has arisen. Tulshi Prasad Singh having died, the present suit has been brought against his sons and Deonath Singh to recover the money by sale of the property hypothecated.

The defendants Nos. 1 to 3 are the minor sons of Tulshi Prasad Singh and their case is that for the purposes of paying the price of a pre-empted property their father or their uncle were not authorized by the Hindu law to mortgage the joint family property and, therefore, the suit must fail.

The learned Subordinate Judge who heard the suit agreed to this contention and dismissed the suit, so far

(1) (1928) I.L.R., 50 All., 776.
(2) (1928) 26 A.L.J., 777.
(3) (1928) I.L.R., 50 All., 969.
(4) (1926) 53 I.A. 253 (261, 265).

as it was for enforcement of the mortgage; but he gave a simple money decree against Deonath Singh on foot of the personal covenant contained in the mortgage bond.

Deonath Singh has not appealed. The plaintiffs have filed this appeal and they contend that the mortgage was a prudent and beneficial one and should be upheld. There was another plea taken that the sons could not both retain the benefit acquired with the plaintiffs' money and at the same time refuse to pay the same. This plea cannot be substantiated on facts. It appears from the written statement of Deonath Singh, and there is no evidence to the contrary, that the property acquired by pre-emption has been lost to the family because of a suit brought by a minor member of the family of the vendors. The appeal came up for hearing before two learned Judges of this Court, and having regard to the conflict of decisions on the question of the powers of the manager of a Hindu family to raise money on the security of joint family property for the purchase of new property, they referred the whole case to a larger Bench.

The view which I have taken of the manager's authority to raise money in the circumstances stated above is contained in the judgment in *Kishen Sahai* v. *Raghunath Singh* (1) and *Inspector Singh* v. *Kharak Singh* (2). As the point has been referred to a larger Bench so that the law on the point may be settled, I think it necessary for me to discuss the entire law on the point.

To get hold of the principle on which the appeal is to be decided, we must look to the Hindu law; for the question is one of Hindu law and Hindu law alone. The constitution of a Hindu family with property and the powers of the father or the manager to mortgage the family property have been dealt with and stated by Vijnaneshwar in his book, the Mitakshara. I shall read the statement of the law made by Vijnaneshwar from the translation of Colebrooke.

(1) (1928) I.L.R., 51 All., 473. (2) (1928) I.L.R., 50 All., 776.

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In part II, chapter I, section 1, paragraph 27, Vijnaneshwar says: "Therefore it is a settled point that property in the paternal or ancestral (grand-parental) estate is by birth, although the father has independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth; but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained, 'Though immovables or bipeds (this probably means slaves) have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made.'"

The rule, therefore, is that the family property is for the support of those who are in existence, those who are in the womb and those who are not yet begotten and, therefore, the property cannot be disposed of by the father without the consent of his sons. The same rule applies when the manager is not the father but, say, an uncle. He must have the consent of all other members of the family in order to transfer the same, because they have a right in the property. This being the state of the law, it might work to the disadvantage of the family in cases where some of the members are minors and yet there is an urgency to raise money. An exception, therefore, is made and mentioned in the next paragraph, No. 28. It reads as follows: "An exception to it follows: 'Even a single individual may conclude a donation, mortgage, or sale, of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes.'" This is a quotation made by the author of the Mitakshara from the Smriti

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of Vrihaspati cited by Ratnakar. Having quoted the text, Vijnaneshwar proceeds to explain the meaning of the text quoted. He says in paragraph 29: "The meaning of that text is this: while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so (minors) and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale, of immovable property, *if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable.*" The exception to the general rule which was mentioned in the text required explanation and what has gone above is the meaning put to it by Vijnaneshwar. The three conditions in which a single member is allowed to transfer the property are (1) a season of distress, (2) for the sake of the family, and (3) pious purposes. Vijnaneshwar says that in the case of No. 1 there should be a calamity affecting the whole family and the calamity cannot be averted without the transfer. His language is "if a calamity affecting the whole family require it." The second case (sake of the family) is explained by Vijnaneshwar as meaning that the support of the family renders it necessary to make the transfer. It will be noticed here that what has been translated as "sake of the family" has been understood by Vijnaneshwar as meaning the support of the family and not the aggrandizement of it and not the adding of wealth to the family. The third case (pious purposes) has been understood by Vijnaneshwar as meaning indispensable duties such as the obsequies of the father or the like, duties which cannot be avoided. The making of a gift out of sheer charity may be a pious duty but that is not the sort of pious duty that Vijnaneshwar understands. The pious duty must be one that cannot be avoided. Such being the state of the Hindu law, as explained by Vijnaneshwar whose authority in this part of the country is paramount, we have to see

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whether a purchase of property, or acquisition of property by pre-emption—which is the same thing, only more costly and more speculative—on the security of the joint ancestral property comes within the exception. In an ordinary case of pre-emption the purpose is neither the avoidance of a calamity nor support of the family nor performance of an indispensable duty like a *sradh*. It has been argued that it may be that the person who has purchased the property is a very bad man with tyrannical habits and it might be feared that if he was allowed to purchase the property, he might in course of time swallow up the whole family property. If a case like that can be made out, it is possible to say that the pre-emption would be an act to avoid a calamity which affects the whole family. The calamity must be one which affects the whole family. This cannot be forgotten. No such allegation has been made in this case and we need not consider such a hypothetical case.

On a bare reading of the Mitakshara, therefore, the mortgage in question must be held to be unjustified and therefore not binding on the family property.

It appears that their Lordships of the Privy Council in the case of *Hunooman Persaud Panday* v. *Babooee Munraj Koonweree* (1) considered the powers of the manager of an infant heir to charge the minor's estate. In that case the mother of the infant heir had made a mortgage and the validity of that mortgage was in question. Their Lordships laid down the extent of the power of the manager in the following well known passage which will bear quotation: "The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected

(1) (1856) 6 Moo. I.A., 393.

by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

This law was laid down as between a minor and his manager and has no direct reference to the conditions of the joint Hindu family in which there are certain minor members. But this very passage has been quoted from time to time as also covering the case of a joint family. It has been understood from this statement of the law that it is only in the case of a necessity alone that the manager of a Hindu family in which there are minors can charge the estate. In discussing the liability of the sons for the father's debts, in the well known case of *Brij Narain* v. *Mangal Prasad* (1), their Lordships of the Privy Council mentioned the somewhat illogical state of things, namely, the limited power of the father in charging the property and the unlimited liability of the sons to pay the father's antecedent debts. In discussing the situation their Lordships said, at page 101, "On the one hand it is settled law that the manager as such cannot bind the estate at his own free will and *without any compelling cause* so as to bind the reversionaries. He can bind it for necessity, the necessity being the necessity of the family . . . ." It will be noticed that this is in accordance with the law as propounded by Mitakshara. The calamity should be one which affects the whole family. The rest of the discussion of their Lordships relates to the liability of the son to pay his father's debt. In concluding the judgment their Lordships laid down the law in five propositions, and the first one is: "(1) The managing coparcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity." As the present case is not a case of a debt of a father, it is not necessary to consider the other propositions of law laid down by their Lordships. From

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(1) (1923) I.L.R., 46 All., 95 (101).

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this case we find that apart from the question of payment of father's debt, a father as the manager of the family can burden the estate only for *the purposes of necessity* and that necessity, to quote the language of their Lordships again at page 101, must be a "compelling cause" and the necessity must be a *necessity of the family*. It is difficult to believe that their Lordships of the Privy Council had not in their mind the rule laid down by the Mitakshara quoted in the beginning of the judgment. In their Lordships' opinion the test of a single member's authority to burden the family property is confined to the existence of "compelling necessity", which is a "necessity of the whole family". If we analyse the three cases in which Vijnaneshwar permits the manager to transfer immovable property belonging to himself and members of the joint family some of whom are minors, we shall find that the single test applied by their Lordships of the Privy Council in *Brij Narain's* case is enough. The "compelling necessity of the whole family" will cover the case of *calamity*, will cover the case of *support of the family* and will cover the case of a *death in the family* and the *performance of the obsequial rites*. It has been urged that the statement of the manager's power laid down by their Lordships of the Privy Council in *Hunooman Persaud's* case (1) gives wider powers to the manager and he can burden the family property in order to "confer benefit on the estate". There can be no doubt that their Lordships do use the words "benefit to the estate" in the passage quoted above from *Hunooman Persaud's* case. But then we have to see what was in their Lordships' mind when they used the expression "the benefit to be conferred upon it". Did their Lordships mean any benefit which was not a case of a necessity or was it the case that the expression "benefit to be conferred on the estate" was meant to be an equivalent of the words "for the sake of the family" to be found in Colebrooke's translation in

(1) (1856) 6 Moo. I.A., 393.

paragraph 28, chapter I, section 1 of the Mitakshara? If we suppose that the expression "benefit to be conferred" was meant to be a benefit which was not the kind of benefit expressed by the expression "for the sake of the family" (paragraph 28, Mitakshara, and which has been explained in paragraph 29 by Vijnaneshwar), then there is a conflict between the statement of the law in *Hunooman Persaud's* case and the statement of the law contained in *Brij Narain's* case (1). Their Lordships confine the authority of the manager to a case of compelling necessity.

In my opinion there is no conflict between *Hunooman Persaud's* case and *Brij Narain's* case. The benefit to be conferred mentioned at page 423 of the report in *Hunooman Persaud's* case is a benefit of the same character as has been described in the Mitakshara as "for the sake of the family" and which has been further explained in Mitakshara as "for the support of the family, render it necessary". That this is so will be clear from the illustrations given by their Lordships themselves in *Hunooman Persaud's* case and in subsequent cases.

In *Hunooman Persaud's* case the illustrations given by the Privy Council were "the actual pressure on the estate" and "the danger to be averted". These were really explained by the words that followed, namely, "or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded". According to my reading of the passage, their Lordships described the two instances quoted, namely, the "pressure" and the "danger", as two instances where, by their removal, benefit could be conferred on the estate.

This idea will be made clearer from a more recent case decided by their Lordships, namely, *Palaniappa Chetty* v. *Sreemath Devasikamony* (2). In this case, which was a case of a mahant burdening the *math* property, their Lordships are reported to have said at page 718:

(1) (1923) I.L.R., 46 All., 95. (2) (1917) I.L.R., 40 Mad., 709 (718).

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"It is impossible, their Lordships think, to give a precise definition of it (benefit) applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and *such like things* would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not." It will be noticed that the three instances quoted by their Lordships were all cases where a danger was to be averted, which were cases of *real necessity*. The words "and such like things" used by their Lordships contemplated that other instances of "benefit to the estate" were to be of the same nature as the three illustrations given. It is true their Lordships stated that it was difficult to draw the line, but, with all respect, they were bound to say so, because it was humanly impossible to mention all cases of the necessity which may legitimately drive the manager to raise funds on the security either of the family property or of the *math* property. But, in my opinion, there is nothing in the passage to indicate that their Lordships were contemplating any case in which benefit was to be conferred by adding more property to the *math* or family, by alienating or by mortgaging the existing property.

In *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (1) their Lordships of the Privy Council refused to hold that a minor member of a family was bound by the liabilities that arose out of a business started by the adult member of the family, although he was the manager of it. No doubt this was a case under the Dayabhaga law, but the principle to be applied was the same. To take the case of a common illustration, can a man who has been appointed guardian to a minor by the District Judge attempt to acquire property by raising money on

(1) (1922) I.L.R., 49 Cal., 560.

the security of the minor's property? Even if the District Judge's permission for the purpose were not necessary, on general principles such a power will be denied to the manager.

In the latest pronouncement of their Lordships of the Privy Council the same view as was taken in *Sanyasi Charan's* case was reiterated. This is the case of *Benares Bank, Ltd.* v. *Hari Narain* (1). This was a case in which two adult members of a joint family in which there were minors started a business and, for that purpose, borrowed some money. Their Lordships said at page 570 : *Mukerji, J.*

"Next it was argued that a business started by the father as manager, even if new, must be regarded as ancestral. Their Lordships do not agree. It is in direct opposition to the ruling of the Board in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (2). The judgment in that case proceeded on the broad ground that the manager of a joint family has no power to impose upon a minor member of the family the risk and liability of a new business started by him. That, no doubt, was a Dayabhaga case, but there is no distinction in principle on this subject between a case under the Dayabhaga and one under the Mitakshara. The power of the manager of a joint family governed by the Mitakshara law to alienate immovable property belonging to the family is defined in verses 27 to 29 of chapter I of the Mitakshara. The judgment of the Board in *Hunooman Persaud Panday* v. *Babooee Munraj Koonweree* (3), relied on by the Bank, was *founded apparently on those verses*. A new business, their Lordships think, is not within the purview of those verses. It does not make any difference that the manager starting the new business is the father. Their Lordships find that the balance of authority in India is in accordance with this view."

This case is an express pronouncement that the law contained in *Hunooman Persaud's* case is the same law as is laid down by the Mitakshara in verses 27 to 29 of chapter I, section 1, of the Mitakshara, and that, therefore, a starting of a new business by the managers cannot be regarded as coming within the three cases given by

(1) (1932) I.L.R., 54 All., 564. (2) (1922) I.L.R., 49 Cal., 560.
(3) (1856) 6 Moo. I.A., 393.

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Mitakshara as the cases in which a single member of the family can alienate the joint family property.

This case, further, leaves no room to doubt what was meant by their Lordships of the Privy Council by the expression "benefit to be conferred on the estate" in *Hunooman Persaud's* case. As I have said above, the five illustrations which their Lordships give, two in *Hunooman Persaud's* case and three in the case of *Palaniappa Chetty* v. *Sreemath Devasikamony* (1), all indicate cases of necessity or "compelling cause" or "necessity, the necessity being the necessity of the family"—expressions used at page 101 in *Brij Narain's* case.

Examining then the case in view of the Hindu law and the pronouncements of their Lordships of the Privy Council and also on general principles, it is clear that a case of raising money on the security of the joint family property for the purpose of acquiring fresh property cannot come within the three cases cited as "cases of exception" in paragraphs 28 to 29 of chapter I, section 1, of the Mitakshara.

I need hardly mention that the property being the property of several persons, one or two persons who happened to be the adult members at the time have no right to jeopardize it by a mortgage, especially when the raising of the money is not necessary for the support of the family or for avoidance of a calamity affecting the whole family or for performing the funerals of a deceased member of the family. If any adult member thinks that it would be conducive to the interests of the family or himself to acquire more property, he is at liberty to have a partition effected and he can proceed as he likes by raising money on the security of his own share. The funds which are regarded as the funds for the "support of the living and the persons in the wombs of their mothers and those who are yet unbegotten" cannot be utilised on the off-chance of doing good to the family.

(1) (1917) I.L.R., 40 Mad., 709

It was argued that a self acquisition might be made a part of the joint family, by the acquired property being thrown into the joint stock, and that, therefore, when that property has gone into the joint stock, it should be open to the manager to raise money on the security of the family property in order to benefit the thing which has become now the joint family property. By way of illustration it is said, "Suppose the father with minor sons starts a business and makes money, he can make what was his own separate business the family business by throwing that business into the common stock". But the business can be thrown into the common stock only in the sense that the father declares that it is no longer his separate property but it is the property of himself and his minor sons. We may assume that the consent which would be necessary to accept a property given by one to another may be supplied in the case of minor sons by the father himself. But this gift, by the method of throwing the business into the common stock, will not and should not allow the manager, even if he be the father, to utilise the joint family property, which, it must be remembered, is a fund for the support of the existing and yet-to-be-born members of the family. That this is so has now been clearly pronounced by their Lordships of the Privy Council in the case of *Benares Bank, Ltd.* v. *Hari Narain* (1).

Having then dealt with the case on the basis of Hindu law, on the basis of Privy Council rulings and on the basis of general principles, let us look to the decisions of our High Court. I may mention here that no case of any other High Court has been cited to us.

Going to earlier cases, we find that in *Nathu* v. *Kundan Lal* (2) a manager who was the father was allowed to mortgage the family property in order to pay the price of a pre-empted property, on the ground that the pre-emption decree created a "debt" of the father. With all respect, I am unable to accept this view. It is neither

(1) (1932) I.L.R., 54 All., 564. (2) (1910) I.L.R., 33 All., 242.

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a debt nor an antecedent debt. The money had not been borrowed in any sense of the word. The liability had no doubt been contracted, but that was a liability which cannot be called a debt. The price which a man has to pay for a property agreed to be purchased is not a debt at all, at any rate till the property has already come into the hands of the purchaser and the price remains unpaid. In that case it might be said that the purchaser owes money, and therefore a debt, to the seller. In the case of pre-emption the property is to be obtained only on payment, and if no payment is made the property cannot be got. A similar view was taken in the case of *Tula Ram* v. *Tulshi Ram* (1). The case is to be distinguished, because there was a clear finding that the purchase was to be beneficial to the family and the mortgagee who had advanced the money had made such inquiries as would result in his holding a good mortgage. No such circumstances appear in this case. It is a simple case of pre-emption.

The view taken in *Natha's* case, and which had been followed in the case of *Kapildeo* v. *Thakur Prasad* (2), was dissented from in the case of *Chaturbhuj* v. *Govind Ram* (3). The learned Judges held that the pre-emption money was not an antecedent debt and would not support a transfer of the family property. The same view was taken in *Shankar Sahai* v. *Bechu Ram* (4) and it was remarked that the benefit to be conferred mentioned in *Hunooman Persaud's* case was a benefit of a "defensive character". This view, taken in later cases as regards pre-emption, was again taken by a Bench of this Court of which I was a member, in *Kishen Sahai* v. *Raghunath Singh* (5).

It was urged that the Full Bench decision in *Jagat Narain* v. *Mathura Das* (6) has really disapproved of the

(1) (1920) I.L.R., 42 All., 559.
(2) (1913) I.L.R., 36 All., 17.
(3) (1922) I.L.R., 45 All., 407.
(4) (1925) I.L.R., 47 All., 381.
(5) (1928) I.L.R., 51 All., 473.
(6) (1928) I.L.R., 50 All., 969

opinion that the benefit to the estate must be of a "defensive" nature. As pointed out by me in the case of *Kishen Sahai* v. *Raghunath Singh*, the decision ultimately arrived at by the Full Bench on the facts of the case before them might have been arrived at without laying down that the "benefit to be conferred" need not be of a defensive character, for the facts brought the case within the purview of the decision of the case of *Shankar Sahai* v. *Bechu Ram* (1), where it was laid down that the benefit was to be of a defensive character. The facts of the Full Bench case were that the property that was sold by the adult members of the family was situated 19 miles away from the home of the family and it was very difficult for them to manage the property successfully and to the benefit of the family. If the property was not yielding anything we may say that the sale was made for the support of the family; for the property, from its situation, did not support the family. However, without drawing this distinction, it must now be admitted that the authority of the Full Bench case has been entirely destroyed by reason of the decision in the case of the *Benares Bank, Ltd.* v. *Hari Narain* (2). The learned Judges of the Full Bench were requested to consider the law *as laid down in the Mitakshara*, but they refused to do so. At page 973 of the report the learned Judges are said to have remarked: "We were invited to consider passages from the Mitakshara, but their Lordships had those passages before them and they interpreted them in certain language and that language we must and do of course readily accept." The interpretation referred to was the interpretation contained in *Hunooman Persaud's* case. If the learned Judges had read the Mitakshara with the interpretation put on it by their Lordships of the Privy Council in *Hunooman Persaud's* case, I have not the least doubt that they would have arrived at the same conclusion at which I have arrived. With all respect, it was not right to ignore

(1) (1925) I.L.R., 47 All. 381. (2) (1932) I.L.R., 54 All., 564.

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the very source of the law, the Mitakshara, and to try to read the gloss, although the gloss was put by their Lordships of the Privy Council, as if it were the language of a statute. I have done my best to explain with reference to the Mitakshara what their Lordships meant by "benefit to be conferred"; and now as their Lordships themselves have again interpreted the Mitakshara in the case of *Benares Bank*, little more is left to doubt that their Lordships never meant to depart from the strict law laid down by Vijnaneshwar. In my opinion we should now formally overrule the case of *Jagat Narain* v. *Mathura Das* (1).

I hold that the mortgage in suit was not within the authority of the executants and that it is not enforceable against the family property mortgaged.

SULAIMAN, C. J.:—I concur in the conclusion that the mortgage deed in dispute not having been proved to have been for legal necessity or for the benefit of the family, cannot be held to be binding on the defendants.

It seems to me that the answer to the question is not capable of being stated broadly. On the one hand it cannot be said that money required by the manager of a joint Hindu family in order to pay the pre-emption money and costs for the acquisition of fresh property is in all cases without legal necessity or benefit to the family estate and is therefore always outside the authority of the father. Nor can it be laid down, on the other hand, that every manager is entitled to borrow money in order to acquire fresh property by pre-emption. The answer to the question must depend on the special circumstances of each case. Where a pre-emption claim is in reality in the nature of a speculation or is not in the best interests of the family, the action of the manager would be without justification. But there may, for instance, be a case where a rival proprietor wishing to become a co-sharer in the village and thereby causing considerable interference in the management of the family estate purchases

(1) (1928) I.L.R., 50 All., 969.

property, when it is highly beneficial to the family and the estate, if not actually necessary, to exclude him from the village so as to avoid all future trouble; or there may be a case where a substantial share in the ancestral village has been sold very cheap and its acquisition will bring about a considerable improvement in the comfort and support of the family owning a small share in the village and a better enjoyment of the ancestral share. When satisfied that the acquisition was not speculative, but in the best interests of the family and for its benefit as well as for the benefit of the family estate, which an ordinary prudent manager would make, it would be open to a court to hold that the transaction is binding on the other members of the family, even though it is nothing but the raising of a loan on a mortgage of family property for the sake of satisfying the pre-emption decree.

A Full Bench of this Court in the case of *Jagat Narain* v. *Mathura Das* (1) considered the previous authorities and came to the conclusion that transactions justifiable on the principle of benefit to the estate are not limited to those transactions which are of a defensive nature. It must be borne in mind that the same original texts have been differently interpreted under the Mitakshara and the Dayabhaga law, the former restricting the manager's power of alienation to a considerable extent, while the latter giving him almost full disposing power. The text of Brihaspati quoted in the Mitakshara, which allows a transfer of immovable property "during a season of distress, for the sake of the family, and especially for pious purposes", has been commented upon in the Mitakshara. The illustrations given by the commentator need not necessarily be exhaustive and may be illustrative only. They have been responsible for considerable judge-made law based upon the pronouncements of their Lordships of the Privy Council made from time to time. Taking the words, "for the sake of the family", literally, the expression may be even

(1) (1928) I.L.R., 50 All., 969.

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wider in scope than the words, "for the benefit of the family". It is to be remembered that the manager of a joint Hindu family, particularly a father, is not merely like an agent of the other members of the family, but is a coparcener and has full power to manage the family property in the most beneficial manner as a prudent owner would do. He represents the family to the outside world, and authority for his actions is not always to be derived from the consent of the other members of the family, some of whom may be minors and therefore incapable of giving a valid consent. The authority of the Full Bench in *Jagat Narain* v. *Mathura Das* (1) is based on previous case law, and is binding on us so long as it is not overruled by their Lordships of the Privy Council or dissented from by a larger Full Bench.

I do not think that there is anything in the recent case of *Benares Bank, Ltd.* v. *Hari Narain* (2) which would compel us to hold that the above mentioned Full Bench of this Court has by implication been overruled. In that case the *theka* business started by the manager of the family was not an ancestral business. Their Lordships of the Privy Council laid down that the manager of a joint Hindu family has no power to impose upon a minor member of the family the risk and liability of a new business started by him, and that a new business is not within the purview of verses 27 to 29 of chapter I, section 1 of the Mitakshara, and it makes no difference that the manager starting the new business is the father himself. Their Lordships came to the conclusion that the balance of authority in India is in accordance with this view. This pronouncement conclusively lays down that the money required for a new business started even by the father as the manager of the family, involving as it does a risk and liability on the minor members of the family, cannot justify an alienation. The business in that case was in the nature of taking contracts from the Public Works Department relating to buildings and also

(1) (1928) I.L.R., 50 All., 969. (2) (1932) I.L.R., 54 All., 564.

some plumber's business, which might have been more or less of a sporadic character and had an element of speculation in it. It had never been suggested on behalf of the Benares Bank that the business had been started for the benefit of the family or that it had been necessary for its support and maintenance, for instance, to save the family from starvation. There is nothing in the judgment of their Lordships of the Privy Council which necessarily goes against the view expressed by the Full Bench of this Court. I am, therefore, unable to hold that the authority of the Full Bench has been in any way shaken by this recent pronouncement.

Coming to the facts of the case before us, no attempt was made on behalf of the plaintiffs to show that the acquisition of the property by the right of pre-emption was necessary for the family or even that it was for the benefit of the family and the family estate. Both parties appear to have considered as if the question was purely one of law and not a mixed one of law and fact. The learned Subordinate Judge had to record a finding that there was "no legal necessity and no benefit of the estate". In the absence of any proof the claim must fail. I would accordingly dismiss the appeal.

KING, J. :—I agree that the mortgage is not binding upon the joint family property.

In the first place, the loan was not taken to discharge an antecedent debt. The question of "antecedent debt" arises in this case, because the contesting defendants are the sons of Tulshi Prasad Singh, one of the mortgagors. The pre-emption decree gave to the pre-emptors the option of acquiring certain zamindari property upon payment of a certain sum of money within a specified time. The pre-emptors were not under any legal liability to pay the pre-emption money. Therefore it was not a debt. I agree to the view taken on this point in *Chaturbhuj* v. *Govind Ram* (1) and in *Shankar*

(1) (1922) I.L.R., 45 All., 407.

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Sahai v. *Bechu Ram* (1) and in *Kishen Sahai* v. *Raghunath Singh* (2), and respectfully dissent from the decision in *Nathu* v. *Kundan Lal* (3). The case of *Kapildeo* v. *Thakur Prasad* (4) is distinguishable, as in that case the mortgagor had bound himself under penalty to deposit in court a certain sum of money by a certain date.

In the second place, it is not proved that the loan was taken for legal necessity. There is no allegation that the acquisition of the property by exercising the right of pre-emption was necessary for the support of the family; or that the would-be purchaser is an implacable and unscrupulous enemy of the family who would, by buying the property, be in a position to work mischief to the family and to imperil their enjoyment of their ancestral estate. I am not prepared to hold that the acquisition of new property, by pre-emption or otherwise, can in no circumstances be held to be justified by legal necessity. In *Chotkanu Lal* v. *Ganga Singh* (5) a Bench of this Court held, upon the facts of that case, that where a loan had been taken upon a mortgage of joint family property for the purpose of satisfying a pre-emption decree, the loan must be regarded as taken for legal necessity, because it was necessary to exercise the right of pre-emption in order to safeguard the interests of the pre-emptor's family. In the present case, however, no sort of necessity for the loan has been established.

In the third place, it is not proved that the loan was taken for the benefit of the estate. In certain circumstances it might be held that the acquisition of new property by pre-emption was a beneficial and prudent act such as would justify a mortgage of joint family property by the manager. But the facts showing that the transaction was beneficial and prudent must be proved. I cannot accede to the contention that the acquisition of new zamindari property, with money raised upon a

(1) (1925) I.L.R., 47 All., 381. (2) (1928) I.L.R., 51 All., 473.
(3) (1910) I.L.R., 33 All., 242. (4) (1913) I.L.R., 36 All., 17.
(5) A.I.R., 1927 All., 219.

mortgage, must necessarily benefit the estate. It might be prudent and beneficial to acquire certain property for Rs.1,000, but neither prudent nor beneficial to acquire the same property for Rs.3,000. Then, again, the property in question might have a special value to the family owing to its position. Its acquisition by the family might promote the profitable enjoyment of their ancestral estate, and its acquisition by an outsider, especially by a hostile outsider, might be harmful to the interests of the family. In the present case no facts have been brought to our notice from which we could conclude that the acquisition of the new property, by borrowed money, was a prudent act and beneficial to the family.

Certain cases have been cited before us, e.g. *Tula Ram* v. *Tulshi Ram* (1), *Jado Singh* v. *Nathu Singh* (2) and *Jagat Narain* v. *Mathura Das* (3), in which it was held that an alienation of joint family property by a manager for the purpose of buying new property was valid and binding upon the estate. The reason in each case was that the transaction was prudent and beneficial to the estate or family. These decisions have no application to the facts of the present case.

If it had been found in the present case that the acquisition of the new property by pre-emption was "for the benefit of the estate" (in the plain and ordinary meaning of that expression) and such as a prudent owner would make in order to benefit the estate, then we should have had occasion to consider certain further important questions, e.g. whether the rule laid down in *Hunooman Persaud Panday's* case that a manager can charge the estate for the benefit of the estate (as well as "in case of need"), has been tacitly overruled or dissented from in *Brij Narain's* case; or whether the expression "for the benefit of the estate" should be given a very restricted meaning, so as to apply only to transactions of a "defensive" nature, practically co-extensive only with transactions justifiable also by legal necessity.

(1) (1920) I.L.R., 42 All., 559. (2) (1926) I.L.R., 48 All., 592.
(3) (1928) I.L.R., 50 All., 969.

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But in the present case the trial court has found that the transaction was not for the benefit of the estate, and all the members of this Bench have concurred in that finding. We also agree that the loan was not taken for legal necessity or for discharging an antecedent debt. On these findings I think the appeal is concluded. The further questions, suggested above, do not arise and therefore I refrain from expressing any opinion on them. I would only add that I agree with SULAIMAN, C. J., that the authority of the Full Bench ruling in *Jagat Narain* v. *Mathura Das* (1) has not been shaken by the decision of their Lordships of the Privy Council in *Benares Bank, Ltd.* v. *Hari Narain* (2). The two cases are clearly distinguishable upon the essential facts. In the latter case the loan was taken for starting a new business, and it was not even argued (and presumably therefore it was not even arguable upon the facts) that it was a prudent transaction, or for the benefit of the estate. In the Full Bench case the loan was taken for a totally different purpose, and it was held that the transaction was prudent and beneficial.

I agree that the appeal should be dismissed.

BY THE COURT:—We dismiss the appeal, but without any order as to costs as no one appears for the respondents.

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King.

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July, 8

BHOLA UMAR (DEFENDANT) v. KAUSILLA AND ANOTHER (PLAINTIFFS)*

Hindu law—Remarriage of widow—Forfeiture of rights in her first husband's estate—Remarriage allowed by her caste—Custom of forfeiture not a legal incident of a custom of remarriage, but must be proved—Hindu Widows' Re-marriage Act (XV of 1856), section 2—Preamble.

Section 2 of the Hindu Widows' Re-marriage Act, XV of 1856, does not apply to the case of those widows who are

* First Appeal No. 523 of 1928, from a decree of Chatur Behari Lal, First Additional Subordinate Judge of Jaunpur, dated the 13th of August, 1928.

(1) (1928) I.L.R., 50 All., 969. (2) (1932) I.L.R., 54 All., 584.

entitled under the custom of their caste to remarry and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture, under the Act, of the widow's rights in the estate of her first husband on remarriage in such a case.

Also, there is no forfeiture, under the Hindu law itself, on remarriage in such a case. There is no express text which lays down that a forfeiture of the widow's estate will follow upon her remarriage. It is now well settled, according to the authoritative pronouncement made by the Privy Council upon an interpretation of the texts relating to the conditions attaching to inheritance by the Hindu widow, that she is not divested of her estate by living in unchastity. When open unchastity does not entail forfeiture, it would *prima facie* follow that a remarriage would not; for if, according to strict Hindu law and orthodox Hindu religion a remarriage be invalid, it is then tantamount to unchastity. Further, the strict and orthodox Hindu law cannot logically be invoked, in order to furnish a rule of forfeiture on remarriage, applicable in the case of those castes which, in derogation of that strict and orthodox law, have recognized and permitted the remarriage of widows.

A custom of remarriage does not carry with it, as a legal incident thereof, a further custom of forfeiture upon remarriage. The proof of a mere custom of remarriage would not be sufficient to involve forfeiture, and it would be necessary for the party claiming that the widow's estate has been forfeited on account of remarriage to prove that there is a custom of such forfeiture in such a contingency.

Messrs. *B. E. O'Conor* and *Ram Nama Prasad*, for the appellant.

Messrs. *P. L. Banerji*, *R. K. Malaviya*, *Shiva Prasad Sinha*, *Kedar Nath Sinha* and *Lakshmi Saran*, for the respondents.

MUKERJI, J. :—The following point has been referred for decision to the Full Bench : "Does a Hindu widow, who remarries in accordance with a custom of her caste, forfeit thereby her rights in the estate of her first husband?"

I take it that in this case the Hindu widow contracted a valid marriage and the marriage was in accordance with

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and recognized by her caste, and would be recognized by the courts as a valid marriage.

The question put to us does not say whether we have to consider the question on the basis of Act XV of 1856 (Hindu Widows' Re-marriage Act), or whether we should consider it from the point of view of the Hindu law. In certain cases decided by Courts other than this Court it has been held that where a Hindu widow remarries validly according to the custom of her caste, she does not forfeit her late husband's estate under the Act (Act XV of 1856) but she does forfeit it under the Hindu law. As the question put to us is not restricted, we shall have to consider it from both points of view.

To start with, I proceed to consider the question with reference to Act XV of 1856. The Hindu Widows' Re-marriage Act of 1856 contains a rather long preamble which indicates that conflicting opinions were held in Hindu society as to the validity of Hindu widow's marriage, and on account of there being some uncertainty about the view that might be taken in the courts about the validity or otherwise of such marriages, the Governor General in Council was approached to pass a law legalizing such marriages. The preamble is rather long but is very important in order to find out whether the Act was meant or not to apply to the case of those Hindus among whom a custom sanctioned the validity of a widow marriage.

Before I read the preamble I must express my agreement with the opinion which has been expressed from time to time that if there be a conflict between the preamble and the Act itself the preamble cannot govern the Act. In such cases of conflict, it must be taken that the legislature in framing the Act has failed to achieve its object and therefore the language of the Act must prevail over the wishes of the legislature as expressed in the preamble. As an example I may cite the case of the Mussalman Wakf Validating Act of

1913, in which there was a conflict between the preamble and the Act; the preamble professed to give the waqf a retrospective effect, but the body of the Act failed to convey that idea, and it was held that in spite of the preamble the Act had no retrospective effect. The preamble of Act XV of 1856 runs thus: "Whereas it is known that, by the law as administered in the civil courts established in the territories in the possession and under the Government of the East India Company, Hindu widows, with certain exceptions, are held to be, by reason of their having been once married, incapable of contracting a second valid marriage and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property; and whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the courts of justice shall no longer prevent those Hindus who may be so minded from adopting a different custom in accordance with the dictates of their own conscience; and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain; and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare; it is enacted as follows, etc." The preamble notes that there are certain exceptions to the rule that the marriages of Hindu widows were held to be illegal and not sanctioned by the Shastras. The preamble then says that it is just to relieve "all such Hindus from this legal incapacity of which they complain" and the Act proceeds to remove the legal obstacles to the marriages of Hindu widows. It is clear therefore that the legislature wanted to give relief only to such Hindus as complained of their incapacity to contract for their widows a marriage. The Act therefore is an enabling Act and

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was never meant to create a disability where none existed. But, as I have said, if the body of the Act does create a disability which may not have been intended, that disability will have to be recognized.

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Now let us read the Act itself.

The first section legalises the marriage of Hindu widows. It is in most general terms and nothing turns upon the language of this section. The section mentions the history of the legislation by pointing out that certain Hindus did hold that a widow marriage was against the true interpretation of Hindu law, while others hold that it was in accordance with Hindu law.

The second section is in most general language and lays down that whenever a widow contracts a second marriage she would forfeit all her right to maintenance or inheritance from or in her late husband's property. If this section were read literally, it would apply to widows who were not Hindus but were Muhammadans or Christians, in fact, to all widows within British India. This could hardly have been intended and therefore this section must be read *as being controlled by the preamble*. If we have once to bring in the preamble to read the section, should we not see what was the *object* of the Act as expressed in the preamble? The preamble recognized that there are exceptions where a widow marriage was regarded to be valid, and those cases did not require any relief. It follows, therefore, that the Act was meant to apply only to the cases of those Hindus among whom a widow marriage was not permitted by the caste but as regards whom it was contended that although the caste did not permit such a marriage the Shashtras permitted it. If we thus read section 2 and the preamble together, we shall find that there is no conflict between the preamble and section 2. On the other hand the preamble helps us to find out the true application of section 2. Thus read, section 2, in my opinion, applies only to cases where the custom of the caste does not permit of a valid widow marriage.

It is not difficult to see that the rule of forfeiture or loss of the right of maintenance was enacted by way of a compromise between extreme views. One party contended that a widow marriage was permitted by the Hindu law and another party contended that it was not so permitted and if allowed would create dissension and trouble in the family. The rule, therefore, was laid down that the widow of a caste where remarriage was not customary may have personally the benefit of the Act but she must cease to have anything to do with her late husband's property, so that feuds and disturbances in the family affairs and the property may be avoided.

Whether this be or not the real object and genesis of the rules, it seems to me clear, as already stated, that section 2 does not apply to the cases of widows who have a right to remarry and who are entitled to remarry validly under the rules of their castes.

Now let us consider the authorities of cases decided in the High Courts.

The learned Judges who have made the reference mentioned some cases, beginning with the case of *Har Saran Das* v. *Nandi* (1). Up to this date, for a space of over 40 years, this Court has consistently held the view that section 2 of the Hindu Widows' Re-marriage Act did not apply to the case of a widow whose remarriage was permitted by her caste. The cases are numerous and at least eleven reported cases have been cited before us. These are : *Har Saran Das* v. *Nandi* (1), *Ranjit* v. *Radha Rani* (2), *Khuddo* v. *Durga Prasad* (3), *Gajadhar* v. *Kaunsilla* (4), *Mula* v. *Partab* (5), *Mangat* v. *Bharto* (6), *Ram Dei* v. *Kishen Dei* (7), *Nagar* v. *Khase* (8), *Bal Krishna Sharma* v. *Paij Singh* (9) and *Abdul Aziz Khan* v. *Nirma* (10).

(1) (1889) I.L.R., 11 All., 330.
(2) (1898) I.L.R., 20 All., 476.
(3) (1906) I.L.R., 29 All., 122.
(4) (1908) I.L.R., 31 All., 161.
(5) (1910) I.L.R., 32 All., 489.
(6) (1926) I.L.R., 49 All., 203.
(7) (1915) 32 Indian Cases, 338.
(8) A.I.R., 1925 All., 440.
(9) (1930) I.L.R., 52 All., 705.
(10) (1913) I.L.R., 35 All., 466.

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We have been told that the other High Courts have taken a different view. The cases that have been cited before us are numerous and all the cases do not require any detailed discussion. Thus I propose to examine only the more important ones.

In *Akora Suth* v. *Boreani* (1) a Hindu died leaving a widow, a minor son and a daughter. The son succeeded under the Hindu law and he died subsequently. Before the son died the widow had married again and on the death of the son claimed the inheritance as the mother. It was held that the suit was maintainable. It appears that there was a difference of opinion between the Judges who heard the case first and there was a Letters Patent appeal. Sir BARNES PEACOCK, C. J., in deciding the Letters Patent appeal expressed the opinion that the object of the Act was to remove all legal obstacles to the marriage of Hindu widows. In this case when the widow remarried she was not possessed either of her son's property or of her husband's property and, therefore, she had nothing to forfeit and section 2 was no bar to her succeeding to the son's estate on the latter's death. This case, therefore, is not in point and does not deal with the question of any remarriage under caste rules and forfeiting property already inherited. Unless there is a discussion of the question it cannot be said that the case is an authority for the proposition which it did not consider and expressly decide.

The next case that I consider is that of *Matungini Gupta* v. *Ram Rutton Roy* (2). This case does not consider the position of a widow who married according to the custom of the caste. It was a case where a widow declared that she was not a Hindu and remarried under the Special Marriage Act (Act III of 1872). It was held by the majority of the Full Bench that she forfeited her interest in her first husband's property. The dissenting Judge, PRINSEP, J., held that the Act applied

(1) (1868) 2 Beng. L.R., 199.

(2) (1891) I.L.R., 19 Cal., 289.

only to those Hindus who remarried as Hindus and under the Hindu law. We have nothing to do with the controversy that was raised in that case. When the case was before the Division Bench, WILSON, J., expressed the opinion that if he had to decide the case under the principles of Hindu law and without reference to express legislative enactments, he would be disposed to hold that the widow's estate was determined by her marrying a second time and he thought that this would not in any way be inconsistent with what was held by the Privy Council in the case of *Moniram Kolita* v. *Keri Kolitani* (1). This dictum has been very much relied upon on the second question which I shall have to consider and I will consider it later on. I may, however, point out here that the lady who remarried was a lady of a twice-born class, being a Vaidya by caste, and in Bengal a widow of her caste could not validly remarry according to the popular notions. This case, therefore, is no authority for the point before us.

The next case from Calcutta is the case of *Rasul Jehan Begum* v. *Ram Surun Singh* (2). This is a two-Judge case and it was held by the learned Judges that a Hindu widow on remarriage forfeited the estate inherited from her former husband, although according to custom prevailing in her caste a remarriage was permissible. At page 594 the learned Judges remarked that the question whether a widow in whose caste remarriage was permitted lost her late husband's property owing to remarriage did not properly arise before them, but they said that if it was necessary they were prepared to follow the Madras case of *Murugayi* v. *Viramakali* (3). In that case the view was taken which was approved of by WILSON, J., in the case already considered, *Matungini Gupta* v. *Ram Rutton Roy* (4), that a widow took her husband's property as the surviving portion of her husband and that when she remarried it could not be supposed that the law which her caste followed would permit the remarried widow retaining the property. This point

(1) (1880) I.L.R., 5 Cal., 776.
(2) (1895) I.L.R., 22 Cal., 589.
(3) (1877) I.L.R., 1 Mad., 226.
(4) (1891) I.L.R., 19 Cal., 289.

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was decided, if it was decided at all, on the basis of Hindu law and not on the basis of Act XV of 1856. In concluding the judgment the learned Judges said that their attention had been drawn to a case of the Allahabad High Court, *Har Saran Das* v. *Nandi* (1), already referred to, to the effect that a widow belonging to a caste in which remarriage is permitted did not upon her remarriage forfeit her interest and section 2 of Act XV of 1856 did not apply. Having said so, they further remarked that it appeared to the Judges that the true position of a Hindu widow inheriting the estate of her husband was not considered in that (Allahabad) case. It follows that the learned Judges decided the case on what they supposed were the principles of Hindu law and not on Act XV of 1856.

The next case is of *Ganga Pershad Sahu* v. *Jhalo* (2). This was a case relating to the right of guardianship of a widow who had remarried according to her caste rules. The Judges had to construe section 2 of Act XV of 1856 and held that the Act did not apply. At the bottom of page 870 the learned Judges accepted the second contention of the counsel for the lady and quoted the case of *Parekh Ranchor* v. *Bai Vakhat* (3) in support of their case. The learned Judges, however, remarked that the forfeiture of her first husband's property would take place under the Hindu law. This case, therefore, does not support the view that there would be a forfeiture under the Act.

In *Mahammad Umar* v. *Mst. Man Kuar* (4) their Lordships professed to follow the case of *Rasul Jehan Begum* v. *Ram Surun Singh* (5) and held that whether Act XV of 1856 applied or not, there would be a forfeiture under the Hindu law; see top of page 918, *per* SANDERSON, C. J. The same view was expressed by the other Judge. This case, therefore, does not support the view that the Act applies.

(1) (1889) I.L.R., 11 All., 330.
(2) (1911) I.L.R., 38 Cal., 862.
(3) (1886) I.L.R., 11 Bom., 119.
(4) (1917) 21 C.W.N., 906.
(5) (1895) I.L.R., 22 Cal., 589.

The case of *Santala Bewa* v. *Badaswari Dasi* (1) was the case of a widow belonging to a caste who had recently adopted the Hindu customs, being an originally non-Hindu of aboriginal tribe; yet it was held that the widow forfeited her first husband's property under the Hindu law. At page 735 the learned Judges remarked that in their opinion the case was governed by the ordinary Hindu law and they further said that section 2 contemplated the case of any widow including the widow of a class among which remarriages are allowed. The case does not discuss any principle, does not discuss the language of the Act and follows what are supposed to be the earlier cases of the Court. I have already pointed out that some restriction will have to be placed on the words "a widow" in section 2 of Act XV of 1856, for it would, otherwise, cover the case of a Muhammadan widow or a Christian widow who, nobody would contend, came within its true meaning.

As a summary of the Calcutta cases we find that the consensus of opinion is that Hindu law governs even those among whom a widow remarriage is permitted and there would be a forfeiture under the Hindu law whether the Act of 1856 applied or not. There is no discussion anywhere as to the effect of the preamble and the effect of the recognition by the legislature that there were certain exceptions in which a widow's marriage was regarded as valid.

Now let us look to the Bombay cases. They are not many that were cited before us. In *Parekh Ranchor* v. *Bai Vakhat* (2), which has already been cited in connection with a Calcutta case, it was held that section 3 of the Act did not apply to the case of a widow who had remarried.

The next case is the Full Bench case of *Vithu* v. *Govinda* (3). With all respect, the authority of this case

(1) (1923) I.L.R., 50 Cal., 727. (2) (1886) I.L.R., 11 Bom., 119.
(3) (1896) I.L.R., 22 Bom., 321.

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is very much vitiated by the large assumption that was made that throughout India the practice prevailed that a widow of a caste among whom remarriage was allowed forfeited her first husband's property. This fact, it was further assumed, was known to the legislature and was acted upon in framing the Act. We may, however, point out that in none of the reported cases coming before this Court the plea was ever raised that the widow claiming the inheritance of her first husband had forfeited, as a matter of custom, her husband's property. This case of *Vithu* v. *Govinda* (1) goes to the full length of supporting the contention that Act XV of 1856 applies. One of the learned Judges pointed out that the preamble was at variance with the body of the Act and, therefore, must give way to the latter. I have already discussed the point and pointed out that such was not the case.

Coming to Madras, the case of *Murugayi* v. *Viramakali* (2) is based on the view of the Hindu law that a widow on remarriage forfeits her first husband's property. The matter came before a Full Bench in *Vitta Tayaramma* v. *Chatakondu Sivayya* (3). Three learned Judges took part in this case and there is no unanimity on any point decided. In this case a Hindu widow had become a Muhammadan and had remarried as a Muhammadan. It was held by two learned Judges, SESHAGIRI AYYAR, J., dissenting, that the claimant forfeited her right under the Hindu law. The two other learned Judges held that Act XV of 1856 did not apply, the third learned Judge being of a contrary opinion. SESHAGIRI AYYAR, J., was of opinion that neither the Hindu law applied nor section 2 of Act XV applied and there was no forfeiture. It can hardly be said that the Madras view is that section 2 of Act XV of 1856 is applicable to the case before us. The question of custom does not seem to have been discussed in this case. In a later case, *Gajapathi Naidu* v. *Jeevammal* (4), a learned single

(1) (1896) I.L.R., 22 Bom., 321.
(2) (1877) I.L.R., 1 Mad., 226.
(3) (1918) I.L.R., 41 Mad., 1078.
(4) A.I.R., 1929 Mad., 765.

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Judge held that section 2 applied even where remarriage was permitted by the caste.

Coming to the Lahore High Court, only one case has been cited before us, namely, the case of *Parji* v. *Mangta* (1). It appears to have been held there that the Act did not apply in the circumstances of a case like this but there would be a forfeiture unless a contrary custom was proved.

In Patna the view seems to have been held that section 2 applied to all cases of Hindu widows' remarriage even if remarriage of a widow was permitted by the caste. In the case of *Musammat Suraj Jote* v. *Musammat Attar Kumari* (2) the widow had become a Muhammadan and had then remarried. The learned Judges remarked that it was a matter of first impression and that the decisions in Calcutta, Madras and Bombay were unanimous that a Hindu widow lost her property. As pointed out in this judgment, as to the decisions in Calcutta, Madras and Bombay it cannot be said that the three High Courts are unanimous that the Act applied. In the Madras Full Bench case (I. L. R., 41 Madras, 1078) two learned Judges held that the Act did not apply. In the Calcutta Full Bench case (I. L. R., 19 Calcutta, page 289) there is no unanimity, and in Bombay (I. L. R., 22 Bombay, 321) the Act was held to be applicable because it was based on an alleged custom believed to have been universal in the whole of India. Then the learned Judge who delivered the judgment of the Bench agreed with the majority of the Judges in the Calcutta Full Bench case and held that section 2 applied. But he mainly based his judgment on the Hindu law. He said: "But even if this interpretation" (of section 2 of Act XV of 1856) "be wrong . . . in such circumstances we are relegated, in coming to a decision, to the general rule of Hindu law." The learned Judge does not discuss the effect of a custom and indeed it was not a case relating to a custom.

(1) A.I.R., 1930 Lah., 1023.

(2) (1922) I.L.R., 1 Pat., 706.

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I have tried to show above that on an independent reading of Act XV of 1856 it is difficult to say that section 2 applies to the case before us. I would decide accordingly, and answer the question in the negative so far as Act XV of 1856 is concerned.

Mukerji, J.

Now I turn to the question of Hindu law. I have read the judgments of the various High Courts which deal with the Hindu law as affecting forfeiture of the widow's property and I am afraid I cannot concur with the view taken. The main argument advanced is this; a widow inherits because she is one-half of the body of her husband (*ardhangini* as she is called), and if she remarries she ceases to be one-half of her husband's body and, therefore, forfeits the right of inheritance. Nothing can be more fallacious, with all respect, than this argument when applied to the case of people who permit the remarriage of their widows. If these people believed that a wife was one-half of the body of her husband and on the death of her husband one-half of his body survived in the widow, how could they possibly have allowed the widow to remarry? How could possibly one, who was one-half of one man's body, have become the one-half of another man's body by a second marriage? If a true rule of Hindu law be that a widow inherits because of being one-half of her husband's body, then a widow-marriage cannot possibly be legal under the Hindu law. Yet not only is there a considerable body of opinion which regards the remarriage of a widow valid according to the Hindu Shashtras, but also there is a considerable body of people who are supposed to be within the fold of the Hindu religion and yet they permit widow marriages. It must follow that those people who allow their widows to make a valid remarriage *never believe* in the doctrine that a wife is a one-half of the body of the husband and that the widow survives the husband as one-half of his body.

If we look at the discussion in the Mitakshara, for example, as to the right of a wife to inherit, we shall see

how difficult the struggle of the author of the Mitakshara was in granting a right of inheritance to the widow. In the Mitakshara as translated by Colebrooke, Chapter II, section I, paragraphs 5 to 29 are devoted to discussions of the conflicting texts and the conclusion is drawn in paragraph 30 that a chaste wife inherits. Thereafter the author discusses the question whether the widow inherits only a portion just enough for her maintenance or the whole of the husband's property. A further discussion and struggle commences and in the last paragraph, 39, the conclusion is drawn as follows: "Therefore it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his coheirs and not subsequently re-united with them, dies leaving no male issue." Vijnaneswara does not even quote, much less does he consider, the text of Brihaspati quoted by Jimutvahana in Dayabhaga (Chapter XI, section I, paragraph 2) which says that a wife inherits because she is one-half of her husband's body. In view of this discussion of what are all regarded as sacred but conflicting texts, how can you say that this is the particular reason why a widow is permitted under the Hindu law to inherit and that because that rule is broken in the case of a remarriage the widow must forfeit what she has lawfully inherited? The Calcutta cases deal with Jimutvahana's commentary, the Dayabhaga, and even there you will find a discussion of the contradictory texts, some laying down the right of a widow to inherit and others denying it. The author of the Dayabhaga devotes no less than 66 paragraphs to the discussion and in paragraph 67 says, "Thus has the widow's right of succession been explained": See Chapter XI of Dayabhaga in Setlur's Hindu Law Books on Inheritance, published by V. Kalyanaram Iyer & Co., edition of 1911. The man would indeed be bold who would say that the *only* reason why a wife inherits under the Hindu law on the death of her husband is that she is one-half of her late husband's body. That, no doubt,

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is one of the reasons given by Jimutvahana when he held that the widow should inherit. I have already pointed out that there was a considerable body of opinion against the right of a widow to inherit.

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The fact of the matter is that Hindu law was a growing set of rules and, at any particular time, the practice of a particular body of people residing at a particular place generally determined the character of the law. It is for this reason that so many schools of law have arisen, although each school of law holds in veneration the same sacred laws known as Smrities.

It is a matter of history and it is well known that the Hindu religion holds within its fold many people who have never had, in any sense of the term, anything to do with the Aryan civilization. When the (Hindu) Aryans came to India and conquered the aboriginal races and spread their dominion, they, naturally, drew within their folds many of the aboriginal tribes, who gradually, out of sheer veneration, started following some of the customs and manners of the Aryan races. The Aryan races never admitted most of these people entirely into their own folds and kept them apart by calling them Shudras, as persons belonging to the fourth class. It was only the privilege of the first three classes, the Brahmans, the Kshatriyas and Vaishyas to read the Shashtras and the sacred laws and to abide by them. The duties of the Shudras as laid down by Manu were to serve the three higher classes; Chapter I, verse 91. Indeed Manu himself says in the clearest terms that his laws were meant mostly for the benefit of the three regenerate or higher classes and not for the Shudras. The vedic rites were meant for the three higher castes alone who were known as twice-born ones. In Chapter II, verse 24, Manu states that the twice-born people were to make their home within a particular area known as Aryavarta or "the country of the Aryans", but the Shudra was allowed to adopt any country as

his home. From verse 26, Chapter II, commence the rules for the purification of a child of the Dwija or twice-born class and the rules that fully relate to the duties of the twice-born. You may read through the whole of Manu and you will find that although in the beginning of his Smriti he says that he is laying down the rules for all the four castes, he concerns himself with only the three higher castes and only distantly with the Shudras.

This being the case, it is not correct that the fine reasons which have been advanced from time to time by the sages as the basis of the Hindu law apply equally to the Shudras simply because the latter call themselves Hindus.

As I have already observed, if we follow one of the reasons given by the founder of the Bengal School for the right of a widow to inherit, namely, her being one-half of her husband's body, she can never remarry and her remarriage cannot be valid. Thus it is clear that the caste which allows a widow to remarry *does not* recognize the reason given by some of the *rishis* for the right of inheritance of a widow and therefore it is not right to say that as those reasons fail in the case of a remarriage, there should be a forfeiture. The castes amongst whom widow-remarriage is recognized are mostly treated as Shudras and you cannot apply the fine reasonings of the *rishis* for deducing the logical result of the acts of those who are practically beyond the closed precincts of the laws for the three twice-born castes. Gautama in Chapter XI, slokas 19 and 20, says that the administration of justice shall be regulated by the Vedas, the Institutes of the sacred law, the Angas, the Upavedas and the Puran. The laws of the country, castes and families, which are not opposed to these sacred records, have also authority. *Cultivators, traders, herdsmen, money-lenders and artisans have authority to lay down rules for their respective classes* : See page 25

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of Ghose's Hindu Law, 3rd edition, volume I. Again there is a text of Vyasa quoted in Vyavahara Mayukha which runs as follows (see the same book, page 35): "The customs of traders, artisans, etc., and those who earn their livelihood by means of agriculture or the stage are not capable of being ascertained by others. Disputes among them should be decided by those of their own class."

I think I have said enough to establish that even the framers of the Hindu law never professed to lay down rules for those who were never really within the narrow fold of the three regenerate classes.

In the case of *Santala Bewa* v. *Badaswari Dasi* (1) the dispute was among Rajbansis and they were originally non-Aryans belonging to Kooch Behar and a non-Hindu aboriginal tribe. It was because they had outwardly adopted Hinduism as their religion that the strict Hindu law was applied to them by the two learned Judges of the Calcutta High Court and, on the ground of oneness of the husband and wife's body, a widow was deprived of what she had inherited from her first husband. With all respect, this was not administering the law of the parties before the court, but the law of a different people. Mr. T. N. Mittra in his Tagore Law Lectures delivered as early as 1879 on Hindu Widows (at page 214) makes the following observations: "I have been considering up to this time the marriage of widows as authorized by Act XV of 1856. There are, however, certain classes of Hindus among whom the marriage of a widow was allowed by custom. *These, I take it, will be governed by the custom on the subject rather than by Act XV of* 1856; as among them the remarriage of the widow *owes its origin to custom, so the incidents connected with that marriage must be governed by the same custom.*" This opinion implies that there can be no forfeiture unless there is a custom to that effect. Loss of caste or

(1) (1923) I.L.R., 50 Cal., 727.

ostracism from society or community for acts which bring on "degradation" under the Hindu law cannot now involve loss of property (Act XXI of 1850).

Under no system of law other than the strict Hindu law, as the orthodox Hindus understand it, it is possible to say that a widow who has inherited some property from her husband should forfeit it because of her remarriage. No Muhammadan, no Christian can think of it. Therefore it cannot be said that it is a matter of natural justice that a widow on remarriage should forfeit the property of her first husband. Unless, therefore, we have got most cogent reasons or a clear rule of law for ordering a forfeiture, we must not do so. On the other hand, the widow is authorised to hold her inheritance for her life, by the following text of Katyayana: "*Aputra shayanam bhartuh palayanti gurau sthita, bhunjitamaranat kshanta dayada urdhwam apnuyuh.*" (Quoted in Sarkar's Hindu Law, 6th edition, page 631.) It has been held by the Privy Council that the injunction that she shall maintain chastity was only a direction, the breach of which did not entail a forfeiture; see the case of *Moniram Kolita* v. *Keri Kolitani* (1).

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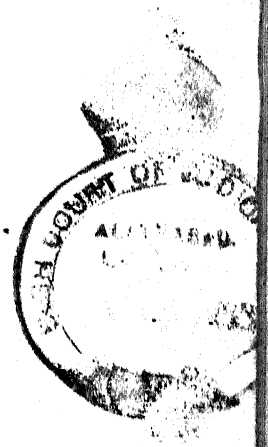

There is yet another ground for holding in favour of the widow. Assuming that the strict rule of Hindu law applies to a caste which does not recognize the strict Hindu law, in that case the remarriage of a widow can only be regarded as an immoral act. The orthodox Hindus *would not recognize the marriage as valid*, although the caste people may recognize it as valid and although the British Indian courts may regard it as valid. It has been held by their Lordships of the Privy Council that a widow who has once inherited her husband's property does not forfeit it by reason of her subsequent immorality; see *Moniram Kolita* v. *Keri Kolitani* (1). The widow after inheritance may lead openly the life of a

(1) (1880) I.L.R., 5 Cal., 776.

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common prostitute, yet she may not forfeit her property under the Hindu law, as interpreted by their Lordships of the Privy Council. Yet it is said that if, instead of leading the life of a common prostitute, the widow should remarry and thereby lead what the world generally regards as a moral life, it must follow that she should forfeit her first husband's property! The orthodox Hindu, as I have said, does not regard the marriage as valid; to him it is no marriage; then why should the marriage be regarded as anything worse than the grossest immorality? Can it be an act of justice to say that living as the wife of one single man would be followed by a punishment, while the grossest immorality cannot be? It was argued that this may be so, but such was the Hindu law.

I, as a Hindu Judge, refuse to believe that such is the Hindu law. I emphatically deny that such is the Hindu law. The Hindu law lays down, not at one place, but at many places, that the Shashtras can never be interpreted apart from dictates of conscience and reason. In Chapter II, sloka 12, Manu says: "*Vedah smriti sadacharah swasya cha priyamatmanah, etashchaturbidham prahuh sakshat dharmasya lakshanam*"; which when translated would mean, "the Vedas, the Smriti, good conduct and the *dictates of one's own conscience* are called by the wise the four sources of dharma." Dharma is nothing but good law. In Sanskrit the word "dharma" is the proper rendering for the word law. Again, Brihaspati says: "*Kebalam shashtramasritya na kartabyohi nirnayah; yuktiheen bicharetu dharmahanih prajayate*" (see Ghose's Hindu Law, 3rd edition, page 1034); which when translated means "Do not arrive at a conclusion by merely discussing the Shashtra or following its letter; for if you follow the law or the Shashtras without recourse to reasons, you incur thereby a sin." Again, Narada says (Chapter IV, sloka 4), "*Dharmashashtra birodhay tu yuktiyukto bidhi smritah*" (see Ghose's Hindu Law, 3rd edition, page 1030). This means

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that where the texts of Shashtras are conflicting one should apply one's own reason. In the teeth of these injunctions to follow your conscience and your reasons, are you justified in saying that it is the Hindu law that the grossest immorality would not entail a forfeiture of property and yet a remarriage would?

The only answer can be an emphatic negative.

For the reasons given above I hold strongly that under the Hindu law, as strictly interpreted or as liberally interpreted, there can be no forfeiture and the answer to the question must be in the negative.

SULAIMAN, C. J.:—There has undoubtedly been considerable controversy as to whether Act XV of 1856 was applicable to all Hindu widows or not. The Allahabad High Court from the very beginning has laid down that the Act does not apply to such Hindu widows as were entitled under their custom to remarry and who were not bound to take advantage of the Act. Opinion in the other High Courts has considerably varied, and the Allahabad view has been openly dissented from. But it appears that with the lapse of time opinion in the other High Courts, particularly the Madras High Court, has come round towards the view of this Court, at least so far as the applicability of the Act is concerned.

The Judges who have held that all widows are governed by the provisions of section 2 of the Act have based their view on the wide language of that section. It reads: "All rights and interests which any widow may have in her deceased husband's property . . . shall, upon her remarriage, cease and determine as if she had then died." If the section were to be taken in its widest scope, it would have to be conceded that the provision of law applies to any widow whatsoever. It would then include not only all Hindu widows, but even Christian and Muslim widows. Such a construction of the section would lead to absurdity. It is, therefore, impossible to say that section 2 of the Act can be

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interpreted without reference to the other provisions of the Act and without reference to the preamble. Were it possible to interpret section 2 standing by itself and independently of everything else, there might have been some force in saying that it applied to all Hindu widows. But we are forced to restrict its scope so as to exclude at least Christian, Muslim, Parsi or Buddhist widows. In order, therefore, to find out the true scope of the section, one is compelled to look to the previous provisions of that Act contained in section 1, as well as to the preamble. No doubt a preamble can never control or restrict the substantive provisions of an Act. It merely supplies a key to the interpretation of those sections. But where there is an ambiguity in the sections or where there is any doubt as to the true scope of the provisions of that enactment, the preamble may be of some guidance.

The Act was professedly passed with the object of removing all legal obstacles to the marriage of Hindu widows. The preamble stated that it was known that Hindu widows, with certain exceptions, are held to be, by reason of their having been once married, incapable of contracting a second valid marriage and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting, whereas many Hindus believed that this imputed legal incapacity, although in accordance with established custom, was not in accordance with the precepts of their religion, and desired that the law should no longer prevent those Hindu widows who may be so minded from adopting a different custom. The Act was intended to relieve all such Hindus from this legal incapacity complained of and to remove all legal obstacles to the marriage of Hindu widows.

It is, therefore, obvious that the legislature recognized that there were certain exceptions to the general practice of widows not being allowed to remarry. Obviously the intention of the legislature was to remove the legal obstacles in the way of remarriage, and not to impose

another penalty or restriction on those who did not stand in need of any legislation. It is, therefore, most unlikely that the legislature would have intended to deprive Hindu widows who by the custom of their caste were entitled to remarry and to retain the property of their husbands from holding the estate. The object of the Act professedly was to enable those widows, who were incapacitated from marrying, to remarry. But as it was considered that remarriage, where it is not allowed by custom, should not disturb the relations of the deceased husbands or their estate, there was an express provision made in section 2 that all their rights and interests in the deceased husband's property shall cease and determine.

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The Allahabad High Court has accordingly held that the Act could never have been intended to apply and did not apply to those Hindu widows who by the custom of their caste had independently of the Act a right to remarry. The point does not appear to have been emphasized in any of the previous cases, nor does it appear to have been refuted in cases taking the contrary view, that there is no option but to restrict the scope of section 2. That section cannot apply to all widows. It can only apply to a particular class of widows for whom the Act was intended. To ascertain that class one is compelled to look to the preamble, which shows that that class of widows consisted of those who were incapable of contracting a second valid marriage. This obstacle in their way was removed and their children were declared by enactment to be legitimate.

The Act was intended to render remarriage valid and to legalise the legitimacy of children. It conferred a benefit on those who could not remarry, but at the same time imposed a restriction on them. It was not intended to deprive those who already possessed the right to remarry, of whatever rights they enjoyed in their deceased husband's properties.

The cases of the various High Courts have been considered at length by MUKERJI, J., and it is unnecessary for

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me to cover the same ground. The Full Bench of the Bombay High Court in *Vithu* v. *Govinda* (1) proceeded on an assumption of prevalence of a custom of forfeiture on remarriage, which is not true so far as these provinces are concerned. In most cases where a custom of remarriage was established the right to retain the estate was also put forward and upheld. Indeed no case has been brought to our notice where a custom to remarry was established and yet the widow was held not to be entitled to retain the estate of her deceased husband. The later view in Calcutta appears to be based more on the supposed principles of Hindu law than on the provisions of the Act. In Madras, this is the opinion of the majority of the learned Judges in the Full Bench case of *Vitta Tayaramma* v. *Chatakonda Sivayya* (2). But in these cases it was simply taken for granted that the Hindu law enforces a forfeiture of the estate, and there appears to be neither any elaborate discussion of the point, nor direct reference to any authorities. The main argument appears to be that because in the Hindu conception of marital relations a wife is considered to be half the body of her husband and the surviving widow remains that half, she cannot retain his estate after remarriage. There is also the supposition that a widow can hold the estate only till her widowhood, and as she ceases to be the surviving half of the body of her husband on her remarriage and cannot thereafter confer spiritual benefit on his soul, she must give up the estate. The notion that a widow is the surviving half of her deceased husband has been called by Sir SESHAGIRI AYYAR, in the Full Bench case of the Madras High Court referred to above, as a "*picturesque metaphor*". Certainly this principle is not the sole basis of her right to succession to his estate. Similarly, when an unchaste widow, who could hardly be imagined to confer spiritual benefit on her deceased husband to whose marital relations she is disloyal, does not cease to hold the estate, the conferment

(1) (1896) I.L.R., 22 Bom., 321. (2) (1918) I.L.R., 41 Mad., 1078.

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of the spiritual benefit cannot be the indispensable condition for the retention of the estate. The question was thoroughly examined by their Lordships of the Privy Council in the leading case of *Moniram Kolita* v. *Keri Kolitani* (1). When considering the question of unchastity, their Lordships had to examine the text of Vrihat Manu and of Katyayana, two verses of which are as follows:

"The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share."

"Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it."

Their Lordships distinctly ruled that these texts related to the right of succession to the estate and not to its retention, and that the conditions of "keeping unsullied her husband's bed", "persevering in religious observances" and "abiding with her venerable protector" were not conditions precedent to the continuance of the widow's estate, and that even if any or all of these conditions were broken, no forfeiture was involved.

The right to hold the estate of her husband is based on distinct texts, and the notion of her being a half of her husband's body has in no text cited before us been made the sole basis for the continuance of her estate.

It is to be admitted that there is no express text which lays down that a forfeiture of the Hindu widow's estate will follow upon her remarriage; nor is there any text which expressly says that her right to hold the estate will terminate on her death or on remarriage. On the other hand, the verse of Katyayana quoted above allows her to enjoy the property until her death, and the heirs are to take it only *after her*. It has been suggested that the

(1) (1880) I.L.R., 5 Cal., 776.

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idea of a Hindu widow retaining her property is incompatible with the conception of Hindu law. But when once the estate has vested in her, there can be no forfeiture unless there is a clear authority for that view, and forfeiture cannot be inferred because of some notional view deducible from some supposed principle underlying the Hindu law of succession. When it is now well settled that unchastity does not involve any forfeiture, it would *prima facie* follow that remarriage would not. It would be putting a premium on unchastity to hold that she can retain the property so long as she remains notoriously unchaste, but the moment she remarries she will forfeit it. The expression "widow's estate" is an English expression and does not imply that the estate continues so long as she continues to be a widow. In one sense she still remains the widow of her deceased husband, even after her remarriage. The expression in Hindu law for "widow's estate" is "Stridhan", which would literally mean "woman's estate", and not necessarily widow's estate. It would be offering an inducement to a widow to be immoral if she were told that she would be in a worse position by validly remarrying than by living in open adultery. A change of religion, like a discontinuance of chastity, involves no forfeiture. There seems to be no good reason for holding that a remarriage recognized by law does so. In the absence of an express text, the Hindu law should be interpreted so as not to cause a shock to one's moral conscience. Obviously the strict Hindu law never contemplated a remarriage for the higher classes. The rules laid down, therefore, do not provide for re-marriages. In the eye of the pure Hindu law remarriage was hardly anything better than concubinage. When remarriage was not recognized it was tantamount to unchastity. In this view of the matter her position should not be any worse than if she were unchaste. Undoubtedly the estate vests in her on the death of her

separated husband dying issueless. The burden is on the party who alleges it to show that there is some well settled rule of law which divests her of her estate. In the absence of any authority to the contrary, her widow's estate must continue. If the Act does not apply, then her estate continues even though she remarries under the custom which allows it.

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When nothing more than a mere custom of remarriage is established, there is no presumption that under the Hindu law she forfeits the estate. The party who is alleging that there has been a forfeiture must establish a further incident of the custom that forfeiture is a necessary consequence. Where such additional custom is established, she would, of course, lose the estate, if she were claiming it under the Act; and she would also lose it if she were claiming the right to remarry under the custom. But where nothing more is established than a mere right to remarry under a custom, it cannot be presumed that forfeiture is a necessary consequence. The burden to prove a custom involving forfeiture is on the party asserting it, and in the absence of such proof it must be held that she could remarry and retain the estate and would not forfeit it. Of course no custom can be established which would override the provisions of a statutory enactment, but where the Act does not apply at all, custom, being a part of the Hindu law, must override the general principles of that law. But a party must go the whole length of proving the full custom on which he relies. By establishing only one part of it he cannot ask the court to infer the other. I would, therefore, have no hesitation in saying that unless it is affirmatively established that in addition to the custom of remarriage there is the further custom of forfeiture of the husband's estate, she is entitled to retain the estate even after remarriage and till her death.

I should like to add that even if I had not been independently convinced of the correctness of the view which has prevailed in this Court, I would have felt

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bound by the long course of unanimous decisions which have been given here. So far as these provinces are concerned, people have acted upon the belief that in the absence of any custom to the contrary a widow who is entitled to remarry under the custom of her caste does not forfeit her estate. Many a title would be upset if this interpretation of the law were to be reversed. There must be many transferees of property who have purchased it in the expectation that their right would continue at least till the death of the widow, who would lose it by her voluntary act of remarriage. It would be extremely dangerous to shake the authority of long established decided cases of this Court, which, not being manifestly erroneous, have stood for a long period of time unchallenged in this Court and have been always followed. Affecting rights in property, they must be treated as having passed into the accepted law of these provinces. Of course where decisions are directly contrary to a statute, it is the duty of a Full Bench to overrule the previous decisions even though they might have stood for a very long time. But where the Act is at least ambiguous and the court does not feel absolutely able to overrule them, it would be unsafe to disturb the course of rulings. No doubt these decisions have been questioned in some of the other High Courts in India, but even there the opinion has varied and in recent times has been converging to the view taken in this Court. The reversion of the estate on remarriage would alter the course of succession and would let the property go to a different individual. Many a reversioner must have refrained from suing immediately on her remarriage in the expectation that succession would open out later on her death. The rulings of this Court must have affected diverse contracts and dealings between man and man. On the principle of *stare decisis* it is our clear duty to adhere to those rulings so long as the legislature does not intervene or their Lordships of the Privy Council do not rule that they are wrong.

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KING, J. :—The chief question for our determination is whether a Hindu widow, who remarries in accordance with the custom of her caste, forfeits thereby her rights in the estate of her first husband under section 2 of the Hindu Widows' Re-marriage Act, 1856. In other words, the question is whether section 2 of Act XV of 1856 applies to a Hindu widow who can remarry in accordance with the custom of her caste.

The language of section 2 is certainly very wide, and if the section is read alone, without regard to the preamble and to the other sections of the Act, it would undoubtedly apply to the present case. Section 2 purports to lay down a general rule that all rights and interests which "any widow" may have in her deceased husband's property shall upon her remarriage cease and determine, as if she had then died. The words "any widow" would not only cover the case of a Hindu widow who is authorised by custom to remarry, but would also apply to a Christian or Muslim widow who had never been a Hindu at any time. I think it could not be seriously argued that a woman who has been a Muslim from her childhood and who married a Muslim husband who died in her lifetime would forfeit all rights in her deceased husband's property under section 2 of the Hindu Widows' Re-marriage Act if she married again. It is clear, therefore, that the wide language of section 2 must be controlled and restricted with reference to the preamble and to the provisions of the Act as a whole. The only question is how far should the language be restricted. The object and the scope of the Act can be ascertained from the preamble. The Act is described as "an Act to remove all legal obstacles to the marriage of Hindu widows". It is further explained that by the law administered in the civil courts, Hindu widows with certain exceptions are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and as many Hindus believe that this imputed legal incapacity is not in accordance with a true

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interpretation of the precepts of their religion, and as it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and the public welfare, therefore the Act has been passed. It is clear, therefore, that the legislature intended to remove all legal obstacles to the marriage of Hindu widows. It could not have been intended to apply to Christian widows or Muslim widows who were able to remarry without taking advantage of the provisions of the Act. For the same reason I think the Act could not have been intended to apply to Hindu widows who were able to remarry in accordance with the custom of their caste without taking advantage of the provisions of this Act. Sections 1 and 2 seem to be closely connected and enact that a Hindu widow who is not permitted by custom or by any interpretation of Hindu law to remarry may nevertheless remarry, but if she does so, she must forfeit all rights and interests in her deceased husband's property. In other words, I think section 2 applies only to those Hindu widows who would not have been able to remarry if the Act had not been passed, and does not apply to Hindu widows who can remarry in accordance with the custom, quite apart from anything contained in the Act. The Act is an enabling Act for the benefit of Hindu widows who would not otherwise be allowed to remarry, and I think it could not have been the intention of the legislature to impose a penalty of forfeiture upon Hindu widows who can remarry in accordance with the custom and who need not rely upon the provisions of the Act to validate their remarriage. The Act was intended to remove legal obstacles to the marriage of Hindu widows and not to impose liability upon widows who could remarry apart from the provisions of the Act.

This interpretation of section 2 of the Act has been consistently adopted by the Allahabad High Court in a long series of decisions beginning with *Har Saran Das*

v. *Nandi* (1). Certain Judges have expressed doubts regarding the correctness of this interpretation, but the current of authority has consistently been followed.

There has been a difference of opinion between the Judges of the Calcutta High Court on this point. The most important case is *Matungini Gupta* v. *Ram Rutton Roy* (2), which was decided by a Full Bench. In that case a Hindu widow married a second husband, not a Hindu, in the form provided by Act III of 1872. The majority of the Full Bench held that by her second marriage she forfeited her interest in her first husband's estate under section 2 of Act XV of 1856. The ruling is not directly applicable to the question now under consideration, because it did not deal with the case of a Hindu widow who remarried in accordance with the custom of her caste. The learned Judges, however, had to consider the meaning and scope of section 2 of Act XV of 1856 and some of their observations are applicable to the present question. WILSON, J., in his referring order (at page 294) holds that section 2 refers to any widow falling within the class to which the Act applies, and at page 293 he holds that the Act applies to Hindu widows other than those who could without the aid of the Act remarry according to the custom of their caste. His view is, therefore, that section 2 does not apply to a Hindu widow who could remarry without the aid of the Act according to the custom of her caste. BANERJEE, J., on page 296 holds that the words "any widow" in section 2 must be taken to mean any widow to whom the Act applies and for whom it was intended. It is doubtful whether he would have held the section to apply to a Hindu widow who could marry according to the custom of her caste, as it could hardly be held that the Act was intended for such a widow. The majority of the Full Bench interpreted section 2 in a wider sense and held that the section applied to all persons who being Hindus become widows.

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(1) (1889) I.L.R., 11 All., 330. (2) (1891) I.L.R., 19 Cal., 289.

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According to that interpretation section 2 would no doubt apply to a Hindu widow who is entitled to remarry according to the custom of her caste, but it must be remembered that the learned Judges were not directly concerned with that question. PRINSEP, J., dissented from the opinion of the majority and held that section 2 was limited only to the cases provided for by the Act, namely Hindu widows remarrying as Hindus under Hindu law as provided by that Act. In his view, therefore, section 2 would not apply to a Hindu widow remarrying according to custom without the aid of the Act. It will be seen therefore that there was a conflict of opinion between the learned Judges on the point whether section 2 would be applicable to a Hindu widow who could remarry without the aid of the Act.

In *Rasul Jehan Begum* v. *Ram Saran Singh* (1) it was held that a Hindu widow on remarriage forfeits the estate inherited from her former husband, although according to custom prevailing in her caste a remarriage is permissible. This decision is based upon the general principles of Hindu law and not upon section 2 of Act XV of 1856. It is true that at the end of the judgment their Lordships referred to *Har Saran Das* v. *Nandi* (2) and dissented from it, but they did not expressly dissent from the view that section 2 of the Act does not apply. Their opinion seems to have been that, whether section 2 applies or not, a Hindu widow upon her remarriage forfeits her interest in her deceased husband's estate under the general principles of Hindu law.

In *Ganga Pershad Sahu* v. *Jhalo* (3) the learned Judges appear to agree with the Bombay High Court in holding that section 3 of Act XV of 1856 has no application to a case where the widow belongs to a caste in which remarriage is permitted; the object of the statute being

(1) (1895) I.L.R., 22 Cal., 589. (2) (1889) I.L.R., 11 All., 330.
(3) (1911) I.L.R., 38 Cal., 862.

to enable widows, who were unable to marry previously, to remarry, the statute ought to be considered as a whole, and such of its provisions as impose a disability ought not to be applied to cases where it is needless for the parties to seek the benefit of the provisions which recognize the right of a widow to remarry. They proceed to point out, however, that even if section 2 does not apply to such a case, the same result might follow from an application of the fundamental rules of Hindu law.

In *Santala Bewa* v. *Badaswari Dasi* (1) it was held that a Rajbansi widow after remarriage forfeits her deceased husband's estate even though there is a custom of remarriage in her caste. The learned Judges held that section 2 of the Act includes even a widow of a caste in which remarriages are permitted by caste custom. In support of their view they state that it is a fact that in almost all castes in which a remarriage is allowed by custom such marriages are followed by forfeiture of the first husband's estate. No authority is given for the statement of fact and there is reason to doubt, as I shall presently show, whether the alleged custom of forfeiture of the first husband's estate is by any means so universal as alleged.

The earlier view of the Bombay High Court in *Parekh Ranchor* v. *Bai Vakhat* (2) was that section 3 of Act XV of 1856 has no application to the case of a widow belonging to a caste in which remarriage is permitted. If section 3 does not apply to such a case, I think it would follow that section 2 would also not apply. In the later Full Bench case, *Vithu* v. *Govinda* (3), the contrary view was taken and it was expressly held that under section 2 a Hindu widow belonging to a caste in which remarriage has always been allowed, who has inherited property from her son, forfeits by remarriage her interest in such property.

(1) (1923) I.L.R., 50 Cal., 727. (2) (1886) I.L.R., 11 Bom., 119(130).
(3) (1896) I.L.R., 22 Bom., 321.

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In discussing the interpretation of Act XV of 1856 it was admitted that the preamble to the Act was at variance with its enacting clauses. The preamble evidently favoured the view that the Act was not intended for all classes of Hindu widows, whereas the enacting clauses are as wide and general as they can be. Their Lordships observed that the variation between the preamble and the enacting clauses was not the result of any oversight but that the legislature deliberately used the more general words in section 2 of the Act, because it was found that while the custom of prohibiting remarriage obtained in certain castes and did not obtain in others, in the matter of forfeiture by the widow of all interest in her first husband's estate there was no such divergence. They referred to certain researches into the customs of castes in the Bombay Dekhan which indicated that there was not a single caste in which any custom to the contrary prevailed. Hence their Lordships concluded that section 2 was only declaring by statute what was already a universal practice. With due respect to their Lordships I do not think it can safely be inferred that even if the legislature knew that among the tribes or castes of the Bombay Dekhan a custom was in force that a Hindu widow should forfeit her rights in her husband's estate upon her remarriage, this would furnish an adequate ground for enacting, by a statute applicable to the whole of British India, the rule that forfeiture of interest in her deceased husband's estate must be a necessary consequence of the remarriage of every Hindu widow, whatever the custom of her tribe or caste may be. The Bombay Dekhan is only a small part of British India and it appears that the rule of forfeiture is by no means universal in this province at least among those castes in which widows are permitted to remarry. In most of the long series of cases decided by the Allahabad High Court the plea was never raised, in cases where a custom of remarriage was

admitted, that remarriage entailed forfeiture of interests in her deceased husband's estate. If forfeiture of such interests was a necessary incident of the custom of remarriage it is inconceivable that such a customary incident should not have been pleaded. In *Ranjit* v. *Radha Rani* (1) a custom of forfeiture upon remarriage was alleged but it was held to have been disproved upon the evidence. In *Mangat* v. *Bharto* (2) it was held that when a widow remarried according to custom then it was customary for her to retain her interest in her deceased husband's estate. The same custom, of retaining her interest in her deceased husband's estate, was proved in *Ram Dei* v. *Kishen Dei* (3). In *Narpat* v. *Janaka* (4) it was held that forfeiture was not one of the legal incidents of the custom under which an Ahir widow is allowed to remarry. It appears therefore from an examination of the cases on this point in the United Provinces that where the custom of remarriage has been admitted or proved, then the custom of forfeiture has usually not been even pleaded as a legal incident of the custom of remarriage; when it has been pleaded it has never been proved and in some cases a contrary custom has been proved affirmatively. In my opinion therefore it is erroneous to assume that in cases where Hindu widows are allowed by custom to remarry, forfeiture of interests in their deceased husband's estate is universally recognized as a legal incident of the custom of remarriage. It cannot therefore be safely inferred that the legislature when enacting section 2 of Act XV of 1856 in very wide terms were only giving statutory sanction to a universal custom. The authority of the Bombay and Calcutta rulings is weakened by their reliance upon an erroneous assumption.

There has been some difference of opinion in the Madras High Court on the question whether section 2

(1) (1898) I.L.R., 20 All., 476.
(2) (1926) I.L.R., 49 All., 203.
(3) (1915) 32 Indian Cases, 338.
(4) (1920) 24 Oudh Cases, 11.

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would apply to a case of this sort. The most important case is *Vitta Tayaramma* v. *Chatakondu Sivayya* (1). This dealt with a case where a Hindu widow became a Muhammadan and married a Muhammadan husband, so it is not directly in point. But the views expressed by the Judges on the applicability of section 2 have some bearing upon the question before us. PHILLIPS, J., (at page 1080) held that section 2 was applicable to the facts of that case. KRISHNAN, J., took a contrary view. He remarked that having regard to the scope and object of the Act as stated in the preamble and seeing that it is a purely enabling Act, its provisions should not be applied to affect the property of persons who do not and could not take advantage of it. He came to the conclusion that the word "remarriage" in section 2 referred only to a remarriage *under the Act* and not to any remarriage whatsoever. He clearly held that section 2 would not apply to the case of a Hindu widow who is permitted by custom to remarry, and he dissented from the reasoning in the Bombay Full Bench case in the following words: "With all deference I am unable to follow this method of interpretation, nor am I satisfied that the practice of widows forfeiting their right in their first husband's property on remarriage is so universal in India as is stated. If there are castes which allow widows to remarry and keep their estates at the same time (and I am not sure there are not any) I can see no reason to think that the legislature in enacting Act XV of 1856 intended to interfere with the rights of such widows." I emphatically endorse these remarks. WALLIS, C.J., thought section 2 is wide enough to cover the case of any Hindu widow remarrying, whether or not her marriage would otherwise be prohibited by any custom or interpretation of Hindu law. The other two learned Judges OLDFIELD, J., and SESHAGIRI AYYAR, J., both held that section 2 would not apply to the facts of the

(1) (1918) I.L.R., 41 Mad., 1078.

case before them and the remarks of OLDFIELD, J., would also clearly apply to the case of a Hindu widow permitted by custom to remarry.

In view of this conflict of opinion it cannot be said that the Madras High Court are committed to the view that section 2 applies to Hindu widows permitted by custom to remarry.

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The Lahore High Court in *Parji* v. *Mangta* (1) held that the Act does not apply to the case of a Hindu widow who remarries according to the custom of her caste. The Patna High Court in *Musammat Suraj Jote* v. *Mst. Attar Kumari* (2) took the contrary view, following the Calcutta High Court in *Matungini Gupta* v. *Ram Rutton Roy* (3). The Judicial Commissioner's Court and Chief Court of Oudh have consistently taken the view that section 2 would not apply to a case of this sort. I may refer to *Narpat* v. *Janaka* (4) and *Bhagwan Din* v. *Indrani* (5) and *Ram Lal* v. *Musammat Jwala* (6).

In spite of the fact that certain Judges of certain other High Courts have taken a contrary view, I think the long series of Allahabad rulings, which take the view that section 2 of the Act does not apply to the case of a widow who is permitted to remarry by the custom of her caste, are correct. There is no adequate ground for upsetting the law which has been settled by judicial authority in this province.

A further question arises, whether the widow upon her remarriage would not forfeit her interest in her deceased husband's estate under the general principles of Hindu law even if she did not do so under section 2 of Act XV of 1856.

It appears to me that the general principles of strict Hindu law could not be properly applicable to a caste

(1) A.I.R., 1930 Lah., 1023.
(2) (1922) I.L.R., 1 Pat., 706.
(3) (1891) I.L.R., 19 Cal., 289.
(4) (1920) 24 Oudh Cases, 11.
(5) (1921) 24 Oudh Cases, 297.
(6) (1928) I.L.R., 3 Luck., 610.

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in which a custom of remarriage is admitted. If the members of the caste recognize the remarriage of a widow as valid, then it follows that they do not accept the theories of orthodox Hinduism which would make a legal remarriage impossible. If such theories are rejected by the caste for the purpose of permitting remarriage, it seems illogical to invoke the very same theories for the purpose of holding that if the widow does remarry, then she must forfeit her rights in her deceased husband's estate. MUKERJI, J., has dealt with this aspect of the case at length, and I need only say that I concur in the views which he has expressed. In my opinion, if there is a recognized custom permitting a widow to remarry, then there must also be a custom either of retention of interests or forfeiture of interests in her deceased husband's estate. Retention or forfeiture of interests is merely a legal incident of the custom of remarriage, and in cases where a Hindu widow's right to remarry is governed by the custom of her caste, then I think the question of retention or forfeiture of her interests in her deceased husband's estate must also be governed by custom. Unless a custom of forfeiture is proved, then the widow would retain the interests which have vested in her.

My answer to the reference is, "No, unless a custom is proved whereby the widow forfeits her rights in the estate of her first husband in consequence of her remarriage."

BY THE COURT:—In our opinion section 2 of Act XV of 1856 does not apply to the case of those widows who are entitled under the custom of their caste to remarry and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture under the Act of the Hindu widow's estate on remarriage in such a case.

We are further of opinion that the proof of mere custom of remarriage would not be sufficient to involve

forfeiture under the Hindu law, and that it would be necessary for the party claiming that the estate has been forfeited on account of remarriage to prove that there is a custom of such forfeiture in such contingency.

Let our answer to the reference be sent to the Bench concerned.

PRIVY COUNCIL.

BISHNATH PRASAD SINGH (PLAINTIFF) *v.* CHANDIKA PRASAD KUMARI AND OTHERS (DEFENDANTS)

*J.C.** 1932 *December*, 15.

[On appeal from the High Court at Allahabad.]

Hindu law—Gift—Construction of deed—Gift of immovable property to female—Gift for maintenance—"Malik mustaqil"—*Absolute or life interest.*

By a registered deed a Hindu stated that, as he desired to provide for the support and maintenance of his daughter-in-law, he had made a gift of specified immovable property to her for that purpose, and he thereby declared that she should remain absolute owner (*malik mustaqil*) of the property and pay the Government revenue: *Held* that the deed conferred upon the donee an absolute estate in the property with power to make alienations giving titles valid after her death.

Decree of the High Court affirmed.

APPEAL (No. 43 of 1930) from a decree of the High Court (March 2, 1926) affirming a decree of the Subordinate Judge of Jaunpur (December 21, 1921).

The only question arising upon the present appeal was whether a registered deed of gift executed by a Hindu on the 16th of September, 1862, in favour of his daughter-in-law conferred upon her an absolute or only a life interest in the immovable property which it mentioned. The terms of the deed appear from the judgment of the Judicial Committee.

The High Court, affirming the trial Judge, held that the donee took an absolute interest and that alienations made by her were valid after her death. LINDSAY, J.,

* *Present*: Lord BLANESBURGH, Lord RUSSELL of KILLOWEN, Lor MACMILLAN, Sir JOHN WALLIS, and Sir DINSHAH MULLA.

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referred to the following passage in the judgment delivered by Lord DAVEY in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1): "There are two cardinal principles in the construction of wills, deeds and other documents, which their Lordships think are applicable to the decision of this case. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is . . . that technical words or words of known legal import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense." The learned Judge said that applying the first of these principles it was difficult, having regard to the words of the deed, to argue that there was a gift of anything less than the full proprietary interest in the property; the language was quite definite and precise. According to the above rule no general expression of intention would suffice to control or qualify the clear dispositive words. The argument was that, as the intention appearing was to make a gift for the maintenance and support of the donee, the gift was for her life only; it was sought to support that by the consideration that the gift was to a Hindu female. But in the present case there was no room for the presumption that the gift being for maintenance was for life only, because the deed declared in the plainest terms that she was to have an absolute estate. Applying the second cardinal principle laid down by Lord DAVEY, the learned Judge said that a long line of decisions by the Board established that the word "*malik*" had a definite meaning and connoted the possession of all the rights of a full owner unless the context or circumstances showed a different intention. It could not be presumed that the donor did not know the real meaning of the words

(1) (1897) I.L.R., 24 Cal., 834 (846); L.R., 24 I.A., 76 (85).

"*malik mustaqil*", and there was nothing to show that he did not use them in their natural and proper sense.

MUKERJI, J., after referring to the judgments of the Privy Council in *Surajmani* v. *Rabi Nath Ojha* (1), *Ramachandra Rao* v. *Ramachandra Rao* (2) and *Bhaidas Shivdas* v. *Bai Gulab* (3) as to the construction of a gift or bequest to a Hindu female, said that it was no longer true to say that an attempt should be made to read into a document, which on its face gave an absolute estate to a Hindu female, the intention to give her only a life interest. In his view the wish to provide maintenance was only the motive for the gift and should not be read as a measure of the extent of the gift.

1932. December 13, 15. *De Gruyther, K. C.*, and *Parikh*, for the appellant: The deed of gift recites the donor's desire to provide for the "support and maintenance" of his daughter-in-law, and again uses those words as describing the purpose of the gift. *Prima facie* a gift for maintenance is only for the lifetime of the donee: *Karim Nensey* v. *Heinrichs* (4). The word "*malik*" confers an absolute estate only if the context does not show an intention to give only a life interest: *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (5). Effect should be given to the real meaning of the donor rather than to the expressions used: *Hunooman Persaud's case* (6). The real meaning of the donor was to give the property for the maintenance of his daughter-in-law and therefore for her life only. The words "*malik mustaqil*" merely define the quality of her rights during the period of enjoyment of the gift, the intention being that the donee should have the full estate during her life as if she had taken as heir. *Sarajubala Debi* v. *Jyotirmayee Debi* (7) is distinguishable, because

(1) (1907) I.L.R., 30 All., 84; L.R., 35 I.A., 17.
(2) (1922) I.L.R., 45 Mad., 320 (328 L.R., 49 I.A., 1.
(3) (1921) I.L.R., 46 Bom., 153; L.R., 24 I.A., 76.
(4) (1901) I.L.R., 25 Bom., 563; L.R., 28 I.A., 198.
(5) (1887) I.L.R., 24 Cal., 834; L.R., 24 I.A., 76.
(6) (1856) 6 Moo. I.A., 393 (411, 412).
(7) (1931) I.L.R., 59 Cal., 142; L.R., 58 I.A., 270.

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the grant there expressly conferred a right to transfer and the donee as *mirasidar* had a permanent heritable estate.

Dunne, K. C., and *G. D. McNair*, for the respondent No. 1: In *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1) it was held by the Board that although the words "for your maintenance" were attached to a gift by will the legatee took an absolute interest, a power of alienation being given by the will. Here the declaration that the donee was to be "*malik mustaqil*" equally shows that that was the intention. In *Naulakhi Kunwar* v. *Jai Kishan Singh* (2), also a case of a gift to a daughter-in-law, the Allahabad High Court held that the words "*malik mustaqil*" were even stronger than "*malik*" alone as showing an intention to confer an absolute estate. The fact that the gift was of immovable property to a female is not a ground for cutting down the effect of the words: *Jagmohan Singh* v. *Sri Nath* (3) and cases there mentioned.

Parikh replied.

December 15. The judgment of their Lordships was delivered by Lord BLANESBURGH:—

In this case many questions were canvassed in the courts in India but all, except one, have passed into history. They survive merely as an excuse for the over elaborate and bulky record which is before their Lordships.

The one issue which remains effective concerns a moiety share of a taluqa known as Jakhanian in the Jaunpur District in the Province of Agra which by a registered deed of gift, dated the 16th of September, 1862, was given by Pirthipal Singh, the head of his family, to Musammat Balraj Kunwar, his daughter-in-law. The question is whether that lady had under the deed power to make alienations of the property giving to the

(1) (1896) I.L.R., 23 Cal., 670; L.R., 23 I.A., 37. (2) (1918) I.L.R., 40 All., 575

(3) (1930) L.R., 57 I.A., 291.

respondents titles which are valid after her death. That question has been answered in the affirmative by the Subordinate Judge of Jaunpur and the result is embodied in his decree of the 21st December, 1921, which on appeal was affirmed by a decree of the High Court of Judicature at Allahabad, dated the 2nd March, 1926. The surviving plaintiff claiming under the donor Pirthipal Singh, who is long since deceased, again appeals.

The deed in question is short and in terms simple. Its true effect falls to be determined by the construction placed upon the following passages from it, read together :—

"A moiety share of 'taluqa' Jakhania . . . belongs to me by virtue of purchase made at auction . . . As I have attained old age now, as it is possible that some dispute might arise after my death, and as it is my desire to make some arrangement for the support and maintenance of Musammat Balraj Kunwar, my daughter-in-law, I, the executant, have . . . made a gift of the entire above mentioned property . . . i.e., the zamindari rights appertaining to a moiety share of the above mentioned 'taluqa' to my daughter-in-law . . . for her support and maintenance. I declare and give it in writing that the said Musammat should remain absolute owner (*malik mustaqil*) of this property under this deed of gift and pay the Government revenue. I, the executant, and my heirs and representatives neither have nor shall have anything to do with the above mentioned gifted property. If any person brings any sort of claim in future it shall be considered false and invalid in face of this document. I shall get the name of the said donee to be entered in the Government papers under this deed."

This deed of gift has been most carefully analysed by LINDSAY, J., in his judgment in the High Court and therein he has set forth with great clarity the reasons which have led him to the conclusion that the deed confers upon the donee an absolute estate in the property and not one which determined with her life.

Their Lordships find themselves in entire agreement with the learned Judge. They are satisfied that his

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reasoning, so far as based upon the terms of the deed alone, is correct and that his conclusion is completely justified by authority. Nothing said by Mr. *De Gruyther* or by Mr. *Parikh* for the appellant has weakened his judgment in any way, and their Lordships might well leave the matter there. But as they find further support for the learned Judge's conclusion in at least two cases cited to the Board, but not specifically discussed by him, they think it may be not without advantage shortly to refer to these now.

The first is *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1), and it has a bearing upon the feature of the deed of gift here to which much importance was attached by the appellant. In the deed, as was pointed out, not only do you find the "support and maintenance" of the donee recited as the purpose of the gift but you find that expression repeated also in the words of disposition.

Now in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* the effect of a disposition of a 4 annas share in a certain zamindari made by will in favour of the youngest wife of the testator and their son was in question. The words of bequest of the 4 annas share were: "I give to you . . . and the son born of your womb for your maintenance," succeeded after an interval by the following words, attached, by construction, to the original gift, "and I give to you the power of making alienation by sale or gift."

Upon these words it was held by the Board that the words "for your maintenance", parcel of the words of gift, were not sufficient to cut down to life interests only the estates taken by the legatees and the reason is stated by Lord WATSON in delivering the judgment of their Lordships at page 43: "It is no doubt true that the gift of the 4 annas share of Silda bears to be made to the Rani and the appellant 'for your maintenance'; but these words are quite capable of signifying that the gift was made for the purpose of enabling them to live in comfort, and do not necessarily mean that it was to be

(1) (1896) I.L.R., 23 Cal., 670; L.R., 23 I.A., 37.

limited to a bare right of maintenance." In that case the wider construction was assisted and adopted as a result of the words conferring upon the legatees a power of disposition by sale or gift. But here the donee is described in the deed as "*malik mustaqil*" and the comprehensive intendment of that expression is illustrated in the second of the two authorities to which their Lordships think it desirable to refer.

It is the case of *Naulakhi Kunwar* v. *Jaikishan Singh* (1), where, as here, a Hindu being the full owner of certain property made a gift of it to his daughter-in-law, describing the donee to the deed as *malik mustaqil*. It appears from the argument of counsel that the gift was expressed to be for "maintenance" (see p. 576, line 13).

In these circumstances the Court pointed out that this Board in *Surajmani* v. *Rabi Nath Ojha* (2), had held that the word "*malik*" alone, unless there was something definite to the contrary in the surrounding circumstances to qualify the meaning of the expression, indicates an absolute estate. "Here," they go on, "we have the word '*malik*' followed by the word '*mustaqil*' which even makes it stronger."

The other indications in this deed pointing in the same direction and all discussed by LINDSAY, J., lend to the words in the present case a completely compelling force.

Their Lordships accordingly do not consider it necessary to go further into the authorities, being really well content to accept on the whole matter the reasoning and the conclusion of that learned Judge.

In their Lordships' judgment the appeal fails, and they will humbly advise His Majesty that it be dismissed with costs.

Solicitors for appellant: *H. S. L. Polak & Co.*

Solicitor for respondent No. 1: *T. L. Wilson & Co.*

(1) (1918) I.L.R., 40 All., 575.

(2) (1907) I.L.R., 30 All., 84; L.R., 35 I.A., 17.

APPELLATE CRIMINAL

Before Mr. Justice Pullan

1932
July, 19.

EMPEROR *v.* DAKHANI AND OTHERS*

Criminal Procedure Code, sections 418, 536—Trial by jury of an offence triable with assessors—Trial valid—Verdict cannot be treated as opinion of assessors—Appeal lies on matters of law only—Misdirection to the jury—Appeal heard on facts.

In a charge under section 325/149 of the Indian Penal Code there is only one offence, namely that of rioting in the course of which grievous hurt has been caused, and the essential part of the offence is the rioting. So, in a part of the province where rioting is not an offence triable by a jury but the offence of grievous hurt is so triable, the mere addition of section 325 to section 149 will not make the case, which is essentially one of rioting, a case triable by a jury.

Where a case not triable by a jury has in fact been tried by a jury, under section 536 of the Criminal Procedure Code the trial is not vitiated thereby. The verdict of the jury in such a case cannot, however, be treated as being the opinion of assessors, and by section 418 an appeal can lie on a matter of law only. Where, however, the verdict of the jury was held to have been vitiated by misdirections, the appeal was heard on the facts.

Messrs. *F. Owen O'Neill*, *R. C. Ghatak* and *S. P. Sanyal*, for the appellants.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

PULLAN, J. :—The seven appellants have been tried in circumstances which give rise to certain questions of law. The charge framed against them was drawn up in the following terms: "That you on or about the 18th day of June, 1931, were members of an unlawful assembly and in prosecution of the common object of beating Bahadur and his son Mahabir some of the

* Criminal Appeal No. 100 of 1932, from an order of Harihar Prasad, Sessions Judge of Allahabad, dated the 28th of January, 1932.

members voluntarily caused grievous hurt to Bahadur and you are thereby, under section 149 of the Indian Penal Code, guilty of causing the said grievous hurt and simple hurts to Bahadur and Mahabir, and thereby committed an offence punishable under section 325/149 and section 148 of the Indian Penal Code." Certain offences are in the Allahabad judgeship triable by a jury. The Sessions Judge, believing that this was a case which under section 269 of the Criminal Procedure Code should be tried by a jury for one of the offences committed, and with the aid of the jurors as assessors for another, empanelled a jury and instructed the jury to give an opinion on the evidence as to the charge under section 325/149 of the Indian Penal Code, and took their opinion as assessors on the charge under section 148 of the Indian Penal Code. This procedure is rendered necessary by the terms of the Criminal Procedure Code where persons are charged with several offences, some of which are triable by a jury and others not. In the present case there is only one offence charged against these persons. It is an offence of rioting in the course of which they caused certain injuries. The Judge had to consider whether that offence was one which could or could not be tried by a jury. In this province all offences of rioting, which are contained in Chapter VIII of the Indian Penal Code, are excluded from jury trial. The Judge appears to have thought that by adding section 325, which is triable by a jury, he brought this case within their jurisdiction. The Judge was mistaken. The charge was not under section 325, but section 325/149, and the wording of the charge shows that the essential part of the offence was rioting. This is indeed inevitable in any case where section 149 is employed, for the basis of that section is that the persons who are held to be jointly responsible for an offence were committing that offence as members of an unlawful assembly and were, therefore, where the offence was one involving the use of violence, as in the present case,

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rioting, within the definition of "rioting" given in the Penal Code. This case, therefore, was not triable by a jury. It was triable by a Judge with the aid of assessors. Section 536 of the Criminal Procedure Code enacts that if an offence triable with the aid of assessors is tried by a jury the trial shall not "on that ground only be invalid". Opinions have been expressed in various High Courts that these words mean that a verdict given by a jury in a case which should have been tried with the aid of assessors can be regarded as the opinion of assessors, and the trial may stand not as a trial by a jury but as a trial with the aid of assessors. This view was held by one of two Judges in *Pattikadan Ummaru* v. *Emperor* (1), and a similar view seems to have been taken by the Calcutta High Court in the case of *Empress* v. *Mohim Chunder Rai* (2). The difficulty in accepting this view is that a jury gives a single opinion. Assessors must give their opinions separately. Consequently the verdict of a jury given as such is not and cannot be the same as the separate opinions of the members of the jury. I have no doubt that on this point I should follow the decision of a Full Bench of five Judges in the Bombay High Court in the case of *King-Emperor* v. *Parbhushankar* (3). I cannot do better than quote the observations of JENKINS, C. J., at page 688 of the report:

"I propose to confine myself to the words of the Code, though, in doing so, I will bear in mind what has been held in the several cases mentioned and discussed in the referring judgment. Section 404 of the Criminal Procedure Code provides that 'no appeal shall lie from any judgment or order of a criminal court except as provided for by this Code or by any other law for the time being in force', and under section 418 'an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal will lie on a matter of law only.' At the same time it is provided by section 536 that 'if an offence triable with

(1) (1902) I.L.R., 26 Mad., 243. (2) (1878) I.L.R., 3 Cal., 765.
(3) (1901) I.L.R., 25 Bom., 680.

the aid of assessors is tried by a jury the trial shall not on that ground be invalid.'

"These sections are clear and need no paraphrase. The first question they suggest is, whether in this particular case the trial was by jury. The record leaves no doubt in my mind on this point; for the events of the trial absolutely negative the view that the accused was tried by the court of session with the aid of the jurors as assessors.

"The offence, therefore, though triable with the aid of assessors, was in fact tried by a jury. This irregularity did not invalidate the trial; but did it attract the consequences of section 418? This turns on the precise force in that section of the words 'where the trial was by jury'. Do they mean 'where the trial should have been by jury' or 'where the trial in fact was by jury'? In my opinion the words are themselves the clearest answer to this question; they relate to what actually occurred, not to what should have occurred. An adoption of the rival view would lead to the result that a reversal of the conditions would leave an accused, who was wrongly tried with the aid of assessors, without any right of appeal, though the scheme of the Code shows that in the view of the legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury. I would under the circumstances answer the reference by saying that in the present case no appeal lies on a matter of fact."

Thus the opinion given by the jury in this case is a verdict which can only be challenged on questions of law.

I have been referred to no case where a trial has been from beginning to end conducted as a jury trial where there was no offence charged which could in law have been tried by a jury. This is, however, the case here, and one of the grounds of appeal is that there has been a misdirection of the jury. In my opinion this objection must prevail. From beginning to end the charge is a misdirection as it required the jury to give an opinion on a riot which a jury cannot be required to give under the law as enacted in this province. It is not the case that the Judge made any attempt to confine the attention of the jury to the causing of grievous hurt.

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He states in his summing up that the law applicable is laid down in sections 141, 142, 146, 147, 148, 149, 323, 325 and 320 of the Indian Penal Code, and he read and explained all those sections to the jurors. The jury therefore were bound to consider this case as a case of rioting, and not as a case of individual assaults; and this is further emphasized by another error made by the Judge in the summing up when he failed entirely to point out to the jury that they were required to give an opinion as to the guilt of each of the persons charged. He has throughout regarded the accused as a body of men and not as individuals. And there is still a third error in his charge when he states that if the jury found the accused not guilty of the graver offence of sections 325 and 148 it would be open to them to find them guilty of the minor offences under sections 323 and 147. But this section 147 is absolutely excluded from trial by a jury. The jury then returned a verdict of guilty in the majority of 3 to 2, and this would normally mean that 3 of the jurors had found all the accused guilty and 2 of them as innocent. It was, however, explained by one of the jurors that this was not their verdict. Consequently the verdict contains a rider to the effect that one of the two dissenting gentlemen held that three of the accused were not guilty, and the others were guilty. In my opinion, therefore, the trial by a jury is vitiated by misdirection. In the circumstances of this case there can be no question of a retrial as the case was not triable by a jury at all, and the jury gave their opinion as assessors on the charge under section 148 which, in my opinion, was the same charge as that which they had tried as a jury under another name. An appeal against this trial with the aid of assessors can be heard on questions of fact, and I have accordingly heard the arguments on behalf of all the seven appellants.

[The judgment then proceeded to deal with the facts and concluded as follows.]

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I accordingly allow the appeals of Baiju and Gharib, set aside their convictions and sentences and declare them to be acquitted. In the case of Dakhani, Bhopua, Chunni, Parshad and Anandi I set aside their convictions and sentences under sections 323/149, but uphold their conviction and sentence under section 147 of the Indian Penal Code. These five men will accordingly surrender to their bail and serve out the remainder of their sentence.

APPELLATE CIVIL

Before Mr. Justice King and Mr. Justice Thom

1932
July, 21.

AMBA SAHAI AND ANOTHER (PLAINTIFFS) *v.* NATHU AND ANOTHER (DEFENDANTS)*

Agra Tenancy Act (Local Act III of 1926), sections 3(11), 112, 197—*Grove-holder—Right to plant new trees in place of dead or fallen trees—"Improvement"—Interpretation of statutes.*

Under the Agra Tenancy Act of 1901, in the absence of a custom or contract to the contrary, a grove-holder had a right to plant new trees in place of those that had fallen down or been cut down, so long as the land retained its character of grove-land, and that right has not been taken away by anything in the new Act. Section 197 of the Act of 1926 does not purport to lay down the rights and liabilities of a grove-holder exhaustively. The right of a grove-holder to maintain the grove by replacing dead or fallen trees is an important incident of the status of grove-holder and the legislature cannot be held to have intended to take away this important right without express words to that effect.

A grove-holder according to the present Act is a tenant, presumably a non-occupancy tenant, and so under section 112 he is not entitled to make an improvement without the written consent of his landholder. But the replacing of dead or fallen trees by the planting of new trees amounts only to "mere repairs" and does not amount to an "improvement" within the meaning of section 3, clause (11). There is a substantial distinction between making a new plantation of trees and maintaining an old plantation.

* Second Appeal No. 1954 of 1929, from a decree of Farid-ud-din Ahmad Khan, Additional Subordinate Judge of Shahjahanpur, dated the 4th of July, 1929, confirming a decree of R. C. Verma, Munsif of Tilhar, dated the 21st of January, 1929.

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Mr. *Haribans Sahai*, for the appellants.

Mr. *Hazari Lal Kapoor*, for the respondents.

KING and THOM, JJ. :—This is a plaintiffs' second appeal arising out of a suit for uprooting certain trees newly planted by a grove-holder, and for a perpetual injunction restraining the grove-holder from planting new trees in future without the permission of the zamindar. The defendants pleaded *inter alia* that they had the right of planting new trees, in place of those which had been cut or had fallen down, without the zamindar's permission. The trial court dismissed the suit and the lower appellate court took the same view and dismissed the appeal.

The facts proved are that the defendants are grove-holders, and that the grove in question was planted more than 50 years before the institution of the suit. The area of the grove is 1·64 acres, and 33 old trees are still standing on it. The courts, therefore, held that the land still retained its character of grove-land. It is further found that the defendants planted about 22 new trees in the month of July, 1925.

As the new trees were planted before the commencement of the Agra Tenancy Act, 1926, the defendants had a right under the law then in force to plant new trees, in place of those that had fallen down or been cut down, so long as the land retained its character of grove-land. For the law on this point we refer to the ruling in *Chokhe Lal* v. *Bihari Lal* (1). In that ruling the customary right of a grove-holder to plant fresh trees was recognized, in the absence of a special custom or contract to the contrary.

In the present case the plaintiffs have relied upon the provisions of the wajib-ul-arz prepared at the previous settlement, between 1870 and 1873. In this wajib-ul-arz a list of groves is set forth, giving particulars of the

(1) (1920) I.L.R., 42 All., 634.

khasra-numbers, the names of the owners, the area, and the number of trees. After giving this list of groves we find the following entry: "As the Government has excluded from the *jama* the area of the groves and uncultivated area we, the persons in possession of the groves, declare of our own accord that we shall do our best in rearing and looking after the trees and that *we shall plant fresh trees in place of damaged trees with the permission of the zamindar.*" In appears, therefore, that the wajib-ul-arz does not even purport to record an existing custom in respect of groves but records a declaration or promise on the part of the grove-holders to the effect that they will plant fresh trees, in place of damaged trees, with the permission of the zamindar. The plaintiffs have failed to establish that the grove now in suit is included among the groves mentioned in the wajib-ul-arz. In our opinion, therefore, the provisions in the wajib-ul-arz cannot be held to apply to the grove in suit since the wajib-ul-arz, at the most, only recorded a contract between the grove-holders of certain groves and the zamindars of the village and those groves did not include the grove now in suit. We hold, therefore, that the courts below were perfectly right in dismissing the plaintiffs' claim for uprooting the new trees which the defendants had planted in July, 1925, before the commencement of the present Tenancy Act.

It has been strongly urged on behalf of the appellants that even if they are not entitled to get the trees which were planted in July, 1925, uprooted, they are entitled to a perpetual injunction restraining the grove-holder from planting any fresh trees in future without their permission.

The appellants' argument is based on the provisions of the Agra Tenancy Act of 1926. It is argued, firstly, that the rights of grove-holders have been defined in section 197. This section mentions certain rights of grove-holders, but is silent on the question whether a grove-holder has a right to replant trees in place of

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trees which have fallen down or been cut down. It is argued, therefore, that by implication the legislature has denied the grove-holders' right of planting new trees.

We are not prepared to accede to this contention. Section 197 does not purport to state the rights and liabilities of grove-holders exhaustively. There is nothing to show that a grove-holder has no right other than a right mentioned in that section. As we have already stated, the law which was in force before the commencement of the present Act recognized the grove-holders' right of planting new trees to replace fallen trees, so long as the land retained its character of grove-land, provided there was no village custom or contract to the contrary. This right of *maintaining* a grove was a very important incident of the right of a grove-holder. It must be presumed that the legislature knew the existing law and in our opinion the legislature cannot be held to have intended to take away this important grove-holder's right without express words to that effect. Merely because section 197 is silent on the point whether a grove-holder has a right to maintain his grove-land as a grove, by replanting trees whenever required, we are not prepared to hold that the legislature has by implication taken away that right.

It is further argued that under section 112 a non-occupancy tenant is prohibited from making any improvement except with the written consent of the landholder. Now, a grove-holder is certainly a "tenant"; see section 3(6). A grove-holder is moreover presumed to be a "non-occupancy tenant"; see section 197(*a*). Grove-land is now included in the definition of "land"; see section 3(2). So it follows that grove-land is a "holding" or part of a "holding"; see section 3(8).

It is further pointed out that under section 3(11) "the planting of trees" is expressly mentioned as an "improvement" with reference to a tenant's holding;

see section 3(11). So the appellants' learned advocate claims to have proved (1) that a grove-holder is prohibited from making any improvement without the written consent of his landholder, and (2) that the planting of trees in grove-land is an "improvement" with reference to the grove-land. He contends, therefore, that a grove-holder is prohibited from planting trees in his grove-land without the written consent of his landholder.

The first proposition must, we think, be conceded. The second proposition is, however, open to doubt. The question turns upon whether "the planting of trees" mentioned as an improvement in section 3(11)(*c*) means only making a *new* plantation of trees or whether it includes the replacing of fallen or useless trees in a grove for the purpose of maintaining the grove.

We think there is a substantial distinction between making a new plantation of trees and maintaining an old plantation. For the purpose of maintaining an old grove it is necessary to plant new trees from time to time, to replace old trees which are dead or useless. But this sort of replanting, for the purpose of keeping a grove in good condition and of preventing further deterioration, would not ordinarily be held to amount to an improvement, and we do not think that it is an "improvement" within the meaning of the Act. All the works which are mentioned as "improvements" in section 3(11) appear to be new works; "the planting of trees" is coupled with "the reclaiming, clearing, enclosing, levelling or terracing of land". The works of this latter nature are evidently intended to refer to new works. Moreover, it is expressly stated in sub-clause (*e*) that "mere repairs" are not to be included among improvements. We think that replacing trees which have fallen down in a grove by planting new trees amounts only to "repairs" and should not be held to amount to an "improvement"

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Filling up gaps among trees of an old grove is analogous to filling up gaps in an old embankment. In each case the work is of the nature of repairs, for the purpose of maintaining the grove or embankment in its original state, and is not an "improvement".

Our conclusions on this point are fortified by the general principle that the legislature cannot be deemed to have intended to take away a very important right incidental to grove-holding without enacting express provisions to this effect. In our opinion the right which a grove-holder had before the commencement of the present Tenancy Act, to maintain his grove by replacing fallen trees, has not been taken away by anything in that Act.

We hold, therefore, that the appellants' contention cannot be accepted and the courts below have come to a right decision. We accordingly dismiss the appeal with costs.

PRIVY COUNCIL

*J. C.** 1933 *January*, 12

KALAWATI DEVI (PLAINTIFF) *v.* DHARAM PRAKASH (DEFENDANT)

[On appeal from the High Court at Allahabad]

Hindu law—Adoption—Authority to adopt—Construction—Khandani rishtadaran—*Estoppel.*

A Hindu by his will authorised one of his two widows to adopt, but forbade her to adopt any son of the relations of her family (*khandani rishtadaran*), or of that of her co-widow, or of his mother; if his brother should give his son in adoption, he should be adopted:—

Held that the will precluded the widow from adopting the son of a daughter of her brother. The word "*khandani*" was used in a general sense as referring to blood relations; the principle that a Hindu female on marriage passes into her husband's family could not be invoked, as it would exclude authority to adopt the son of the testator's brother or any agnatic relation of his.

*Present: Lord THANKERTON, Lord WRIGHT and Sir GEORGE LOWNDES.

Held, further, that it had been rightly conceded on appeal that the widow was not estopped from denying that the adoption was invalid under the terms of the will.

Judgment of the High Court, I. L. R., 50 All., 885, reversed.

APPEAL (No. 126 of 1929) from a decree of the High Court (May 25, 1928) reversing a decree of the Subordinate Judge of Meerut (May 21, 1925).

The appellant instituted a suit against the respondent, a minor represented by his natural mother, contending that an adoption of the respondent by the appellant was invalid, and that it should be declared that a deed of adoption of her, dated August 8, 1918, was void and that the respondent was not the adopted son of her husband.

The facts appear from the judgment of the Judicial Committee.

The trial Judge held that the adoption was invalid as the defendant was within the class of persons who by the terms of the authority were not to be adopted; he further held that the plaintiff was not estopped from questioning the validity of the adoption.

On appeal to the High Court (SEN and NIAMAT-ULLAH, JJ.) the decision was reversed upon both points. The appeal is reported at I. L. R., 50 All., 885.

1932. December, 16. Sir *Leslie Scott*, *K. C.*, and *J. Nissim*, for the appellant.

Subba Row, for the respondent.

Reference was made to Bhattacharyya's Hindu Law, pp. 112—116; Mayne's Hindu Law, para. 701; *Sher Bahadur* v. *Ganga Bakhsh Singh* (1).

1933. January, 12. The judgment of their Lordships was delivered by Lord THANKERTON :—

The appellant is a widow of Ram Saran Das, a Hindu, who died in December, 1896, without issue, but leaving two widows, namely, (1) the appellant, Musammat Kalawati, and (2) Musammat Basanti, and his mother, Musammat Bhawan Kunwar. He left considerable property, movable and immovable, and shortly before his death he had executed a will on the 6th of December, 1896, under which he made the appellant the absolute

(1) (1913) I.L.R., 36 All., 101(122); L.R. 41 I.A., 1(21).

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owner of his property and gave her full powers of disposal and alienation in any way she liked. He also fixed certain allowances for Musammat Basanti and Musammat Bhawan Kunwar and made provision for a residence for them. As regards adoption, he made the following provision, viz. :—

"I authorise Musammat Kalawati to adopt when she wishes, after my death, anybody whom she likes. After making an adoption, Musammat Kalawati or the (adopted) son shall have no power to make a transfer of my property till the life-time of Musammat Kalawati. Musammat Kalawati shall act as guardian of the adopted son so long as he does not come of age, and, during his minority, she shall have power to carry on the management of the property. After the attainment of majority by the adopted son, he and Musammat Kalawati will have power to carry on the management and to enjoy the income of the property, either jointly or in equal shares."

On the 10th of December, 1896, the testator amended his will by the addition of the following provision :—

"Further it is stipulated that if Musammat Kalawati should like to adopt a son, she shall not adopt any son of the relations of her family or of that of Musammat Basanti or Bhawan Kunwar. If my brother, Jiwan, should give his son into adoption she should adopt him, otherwise she should adopt some other boy, and she shall not have a power to make a gift. In case of necessity Musammat Kalawati shall have power to sell or mortgage a portion of the property."

The testator's brother having declined to give his son in adoption, the appellant, on the 8th of August, 1918, adopted the minor respondent according to the usual forms as a son to herself and her deceased husband, and on the same date she executed a deed of adoption in his favour, which purported to proceed in accordance with the provisions of the will. The factum of adoption is not disputed. The minor respondent is a son of Musammat Chandrawati, a daughter of the appellant's brother, Brij Ballabh Saran.

On the 28th of May, 1924, the appellant instituted the present suit against the respondent, asking for a declaration "that the deed of adoption, dated the 8th of August,

1918, executed by the plaintiff in favour of the defendant is null and void as against the plaintiff according to law, and that the defendant is not the adopted son of the plaintiff or her husband; nor can he acquire any right under the document aforesaid, in respect of the property left by Lala Ram Saran Das, deceased."

Of the various grounds on which the appellant maintained the invalidity of the adoption, the only one to be now considered rests upon the prohibition contained in the addition to the will against adoption of "any son of the relations of her family or of that of Musammat Basanti or Bhawan Kunwar," within which the appellant contends that the respondent is included. The respondent, in addition to traversing this contention, maintained that the claim for cancellation of the deed of adoption was time-barred and that the whole claim was barred by estoppel.

The Subordinate Judge, by decree dated the 21st of May, 1925, decided in favour of the appellant and ordered and decreed "that it is declared that Dharam Prakash, the defendant, is not the adopted son of the plaintiff and that his adoption was invalid." By an obvious error the words "or of her husband" are omitted after "plaintiff". The learned Judge held that the respondent was within the prohibited class and rejected the pleas of limitation and estoppel. On appeal this judgment was reversed by the High Court of Judicature at Allahabad and the suit was dismissed by decree dated the 25th of May, 1928. The learned Judges agreed with the Subordinate Judge as to the plea of limitation, but they held, on construction of the prohibition, that the respondent was not affected by it; they also held that the appellant's claim was barred by estoppel. The appellant now appeals from that judgment.

The only question for their Lordships' decision is as to the proper construction of the clause of prohibition, as the respondent conceded that he was unable to support the judgment appealed against on the ground of estoppel.

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This ground was opened upon by the appellant's counsel, and their Lordships are of opinion that the respondent's counsel rightly conceded that there was not evidence to show that any representation of fact had been made by the appellant, as was found by the High Court.

The question for decision turns on the sense in which the testator used the words "relations of her family", which is the translation given of "*khandani rishtadaran*". There can be no doubt that the substantive "*rishtadaran*" will include relations by blood or marriage, but in what sense did the testator use the adjective "*khandani*" (of the family)?

The learned Judges of the High Court have held that, in the case of a Hindu, his "*khandan*" consists of his lineal ascendants and descendants and his collaterals in the male line, and that sisters and daughters after marriage are transplanted from the family and acquire the lineage or *gotra* of their husbands. They point out that the respondent's mother, on her marriage, ceased to belong to her father's family or *khandan*, and that the respondent is therefore not a "*khandani rishtadar*" of the appellant and they hold that the testator must have used these words in the above sense. But, in the opinion of their Lordships, this construction defeats itself, for the three ladies named—on that view—had all changed their family, on marriage, to the family of the testator and his father, and the effect of the learned Judges' construction of the clause would be to prohibit the adoption of agnates of his own family. Common sense is against any such intention on the part of the testator, and any such intention is inconsistent with his express direction to give a preference, in adoption, to his own brother's son. It is clear, in their Lordships' opinion, that the testator was using the word "*khandan*", which is a word in general use, in a general sense as applying to blood relations of the ladies named, and that, accordingly, the respondent falls within the prohibited class and his adoption was invalid.

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Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decree of the High Court, dated the 25th of May, 1928, should be set aside, that the decree of the Subordinate Judge, dated the 21st of May, 1925, should be varied by inserting the words "or of her husband" after the words "adopted son of the plaintiff" and should otherwise be affirmed, and that the appellant should have the costs of this appeal and her costs in the High Court.

Solicitors for appellant: *Douglas Grant* and *Dold*.

Solicitor for respondent: *R. S. Nehra*.

SAHU HAR PRASAD AND OTHERS (DEFENDANTS) *v.* FAZAL AHMAD (PLAINTIFF) AND OTHERS

*J. C.**
1933
January, 13

[On appeal from the High Court at Allahabad]

Muhammadan law—Wakf—Construction of wakfnama—Whether interest in property dedicated—Intention—Transfer of Property Act (IV of 1882), section 8.

On August 29, 1912, a Sunni Muhammadan, who died a few days later, executed a deed by which he purported to sell two villages to his mother for Rs.2 lakhs; the deed stated that she had paid Rs.10,000 and that she was to apply the balance of the price to charitable purposes. By a wakfnama, executed by the vendee on June 23, 1913, she stated the terms of the sale and declared that she therefore made a wakf of the villages, subject to a charge in her favour for Rs.25,000, being the Rs.10,000 paid and Rs.15,000 already spent, and she appointed as mutwallis herself and, after her death, the respondents. A decree made in 1917 declared that the sale was invalid, and that the villages were divisible among the heirs of the vendor, his mother being entitled to a one-third share. She sold that share to the appellants. After her death one of the mutwallis claimed that the one-third share was wakf property and the sale invalid.

Held, that the claim failed because looking at the transaction as a whole the intention of the wakif was to dedicate

**Present*: Lord THANKERTON, Lord WRIGHT, Sir GEORGE LOWNDES, and Sir DINSHAH MULLA.

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only what she thought had been entrusted to her by her son for that purpose. Even if section 8 of the Transfer of Property Act, 1882, had any application to the case, it was excluded by the intention.

Judgment of the High Court, [1929] A. L. J., 620, reversed.

APPEAL (No. 55 of 1930) from a decree of the High Court (March 19, 1929) reversing a decree of the Subordinate Judge of Pilibhit (July 6, 1925).

Respondent No. 1, as one of the mutwallis under a wakfnama executed on June 26, 1913, by Rahim Bibi (then deceased) sued for a declaration that a one-third share in two villages was property dedicated by the deed, and that a sale thereof to the appellants by Rahim Bibi consequently was invalid. The defendants were the appellants, the heirs of Rahim Bibi, also the other mutwallis who were joined as *pro forma* defendants.

The facts are stated in the judgment of the Judicial Committee.

The trial Judge dismissed the suit. The learned Judges who heard an appeal having differed in opinion, there was a reference to a Full Bench. As the result of the opinion of the Full Bench (KENDALL and MUKERJI, JJ.; NIAMAT-ULLAH, J., dissenting) the appeal was allowed, and a decree was made as prayed by the plaintiff. The views of the learned Judges appear shortly from the present judgment. The hearing by the Full Bench is reported at [1929] A. L. J., 620.

1932. December, 2, 5. *Dunne, K.C.*, and *Wallach*, for the appellants: The terms of the deed show that the intention of Rahim Bibi was to carry out the instructions in the sale deed and was not to deal with any interest which she had apart therefrom. The sale deed being invalid the wakfnama was inoperative. The High Court judgment was based upon section 8 of the Transfer of Property Act, 1882. But having regard to the definition of "transfer" in section 5, and to *Muhammad Rustam Ali* v. *Mushtaq Husain* (1), the Act did not apply. In any case the intention necessarily implied excluded the section. Further, the wakfnama was invalid in that Rahim Bibi was *pardanashin* and it was not shown that she appreciated the effect of

(1) (1920) I.L.R., 42 All., 609; L.R., 47 I.A., 224.

its terms: *Farid-un-nissa* v. *Mukhtar Ahmad* (1), *Tara Kumari* v. *Chandra Mauleshwar Prasad Singh* (2).

Their Lordships did not require argument as to the last point, in the absence of any issue framed as to it, or consideration of it in India.

DeGruyther, *K. C.*, and *Abdul Majid*, for the respondents: Mutation of names having taken place under the wakfnama the wakf was complete and irrevocable: Wilson's Anglo-Muhammadan Law, para. 320. Rahim Bibi therefore was incompetent to sell the property or any interest in it. The operative words in the deed covered the third interest which Rahim Bibi took as heir. The effect of the operative words is not to be cut down by the recitals: Elphinstone, Norton and Clark, Interpretation of Deeds, Ch. 10, rule 36, and cases there cited. There was a transfer by Rahim Bibi to herself as mutwalli, and accordingly section 8 of the Transfer of Property Act applied, but in any case the section is a rule of construction generally applicable. The deed stated plainly the property conveyed and thus excluded speculation as to the intention: *Bijraj Nopani* v. *Pura Sundary Dasee* (3), *Gangabai* v. *Sonabai* (4).

Dunne, *K.C.*, replied.

1933. January, 13. The judgment of their Lordships was delivered by Sir DINSHAH MULLA:—

This is an appeal from a judgment and decree dated the 19th of March, 1929, of the High Court of Judicature at Allahabad, which reversed a judgment and decree of the court of the Subordinate Judge of Pilibhit dated the 6th of July, 1925.

The question involved in the appeal is as to the effect of a wakfnama executed by a Muhammadan *pardanashin* lady under the following circumstances:—

On the 29th of August, 1912, Manzur Ahmad, a Sunni Muhammadan governed by the Hanafi law, executed a document purporting to be a sale of two villages, one

(1) (1925) I.L.R., 47 All., 703; L.R., 52 I.A., 342.
(2) (1931) I.L.R., 11 Pat., 227; L.R., 58 I.A., 450.
(3) (1914) I.L.R., 42 Cal., 56; L.R., 41 I.A., 189.
(4) (1915) I.L.R., 40 Bom., 69.

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situated in Pilibhit District and the other in Bareilly District, in favour of his mother Rahim Bibi for a consideration of Rs.2,00,000. It was recited in the deed that Rs.10,000 had been paid by Rahim Bibi. As to the balance of Rs.1,90,000, it was stated in the deed that it was left with Rahim Bibi "with instructions that she should spend it at her discretion in charitable purposes for the eternal benefit of my (i.e. Manzur Ahmad's) soul".

Manzur Ahmad died on the 2nd of September, 1912, leaving him surviving as his heirs according to Muhammadan law two widows, his mother Rahim Bibi, and a paternal uncle, Fazal Ahmad. On his death the widows became entitled between them to one-fourth of his estate, the mother to one-third, and the uncle as a residuary to the remaining five-twelfths.

On the 23rd of June, 1913, Rahim Bibi executed a wakfnama of the villages transferred to her by the sale deed, by which she constituted herself the first mutwalli, and appointed Fazal Ahmad, who is respondent No. 1 on this appeal, and three others, who are respondents Nos. 3 to 5, as mutwallis after her death. It was recited in the deed that she had already spent Rs.15,000 in charity, and a charge was created by the deed on the income of the wakf property for the payment of Rs.25,000. The material part of the wakfnama is as follows:—

"My son Manzur Ahmad, deceased, sold the zamindari property in Bhitaura Kalan and Amkhara mentioned below to me for Rs.2,00,000, took Rs.10,000, a portion of the consideration money, from me and left the remaining amount of Rs.1,90,000 with me as an amount dedicated for religious purposes and authorised me to spend the same. Out of the said amount Rs.15,000 has been spent up to this time. Instead of spending the amount of consideration after which the charity shall come to an end, it is more beneficial to make a 'wakf' of the said property and utilize the income therefrom in charitable deeds as it will be a continual gift and permanent charity. I, therefore, while in a sound state of body and mind and of my

own accord withdraw my possession from the entire 20 biswas 'asli' zamindari property in the village of Bhitaura Kalan, pargana and district Pilibhit, and the entire 20 biswas 'asli' zamindari property, together with the cultivated lands in mauza Amkhera, pargana Richha, tahsil Baheri, district Bareilly, together with all the rights appertaining thereto and make a 'wakf' of the same in the name of the Almighty."

After the death of Manzur Ahmad, litigation ensued between the heirs, the result of which was that the sale of the villages was, in December, 1917, held to be void, as being, under the cloak of a sale, in reality a deathbed gift in fraud of the heirs.

The effect of this decision was that Rahim Bibi took nothing by the sale deed, but was entitled, as an heir, to one-third of the villages. This one-third was sold by her on the 20th of June, 1918, to appellant No. 1 and the father of appellants Nos. 2—6.

The question for decision in the appeal is whether this was a good sale, or whether the one-third share of Rahim Bibi had already been validly disposed of by the wakf-nama.

Rahim Bibi died on the 15th of August, 1921, leaving her surviving as her heirs respondents Nos. 2 and 3.

On the 9th of September, 1924, Fazal Ahmad instituted the suit, out of which the present appeal arises, in the court of the Subordinate Judge of Pilibhit as one of the succeeding mutwallis against the appellants and the heirs of Rahim Bibi and the other mutwallis for a declaration that the wakf was valid to the extent of the one-third share of Rahim Bibi in the two villages which she had acquired by inheritance from Manzur Ahmad, and that the sale to the appellants, being a sale of wakf property, was void, and for other reliefs.

The appellants alone contested the plaintiff's claim. They denied that the wakf was valid to the extent of the one-third share of Rahim Bibi, and pleaded that Rahim Bibi did not intend to create a wakf of what she inherited as an heir of Manzur Ahmad.

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The Subordinate Judge held that there was nothing in the deed to indicate that Rahim Bibi intended to create a wakf of two-thirds as a vendee from Manzur Ahmad and of the remaining one-third as his heir, and passed a decree dismissing the suit.

From that decree Fazal Ahmad appealed to the High Court at Allahabad. The appeal was heard by KENDALL and NIAMAT-ULLAH, JJ., who delivered separate judgments. KENDALL, J., was of opinion that section 8 of the Transfer of Property Act was decisive of the case. That section provides that "unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof." The learned Judge considered that what was transferred by the deed of wakf was "the zamindari property in the two villages", and not the interest which Rahim Bibi had acquired under the sale deed, and that although the wakfnama could not operate on two-thirds of the property, it operated on the one-third which Rahim Bibi owned at that date as an heir of Manzur Ahmad. On the other hand, NIAMAT-ULLAH, J., was of opinion that all that was intended to pass by the wakfnama was what Rahim Bibi believed she had purchased from her son, and that the wakf did not attach to what she acquired as her son's heir. The learned Judge added that Rahim Bibi was a *pardanashin* lady, and that it was for those who set up the wakfnama to show that the consequences that would follow if the sale deed were set aside were fully explained to her.

The learned Judges, assuming apparently that they differed only on a question of law, and that the case fell under the proviso to section 98 of the Code of Civil Procedure, referred the following question to a larger Bench: "Whether the deed of wakf, dated the 23rd of June, 1913, assuming it to be otherwise valid, operates on the one-third share of Musammat Rahim Bibi in villages Bhitaura

Kalan and Amkhera, or whether it is confined to such estate as she was believed to possess in them under the sale deed dated the 29th of August, 1912."

In their Lordships' opinion it is at least doubtful whether this procedure was correct, as the difference of opinion seems also to have covered the question raised by NIAMAT-ULLAH, J., as to the necessity for a fuller explanation of the effect of the wakfnama to Rahim Bibi, and this was not submitted to the new Bench.

The appeal, however, on the question so formulated, was heard by a Bench of three Judges consisting of the two referring Judges and MUKERJI, J. MUKERJI, J., agreed with the opinion of KENDALL, J. NIAMAT-ULLAH, J., adhered to the view which he had previously expressed. The answer of the majority of the Judges was that the wakf attached to the one-third share of Rahim Bibi in the two villages. The result was that the appeal was allowed, and a decree was passed for the plaintiff on the 19th of March, 1929. It is from that decree that the present appeal has been brought to His Majesty in Council.

The sole question for determination on the appeal is whether the wakf attached to the one-third share in the villages which Rahim Bibi acquired as heir of her son, Manzur Ahmad.

In their Lordships' opinion the sale by Manzur Ahmad and the execution of the wakfnama must be regarded as integral parts of one transaction, and the sale being held to be void, the wakfnama falls with it. The sale deed imposed upon Rahim Bibi an obligation to spend Rs.1,90,000, the balance of the purchase price, in charity, and the terms of the wakfnama leave no doubt that she executed the latter document in fulfilment of that obligation, and that she had no intention of making any contribution to the wakf from her own property. The wakfnama begins with a recital of the

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instructions contained in the sale deed, and after stating that Rs.15,000 had already been spent by her in charity, it proceeds to say "I, *therefore*, withdraw my possession from the entire . . . property and make a wakf of the same in the name of the Almighty." That she had no intention of settling anything of her own is also clear from the reservation of Rs.25,000 which she had paid as a charge upon the villages to be repaid to her out of the income. The scheme was, no doubt, as was held in the former proceedings between the parties, a mere device to evade the Muhammadan law, but there is nothing to suggest any intention on the part of Rahim Bibi to do more than to carry this scheme into effect.

Their Lordships are therefore of opinion that the conclusions come to upon this question by the Subordinate Judge and NIAMAT-ULLAH, J., are correct. They think it at least doubtful whether section 8 of the Transfer of Property Act has any application in the present case, but in any event they are of opinion that in order to ascertain the intention of the lady in executing the wakfnama, the whole transaction must be looked at, and upon this they think that her intention to settle only what she thought had been entrusted to her by her son is clear.

Having regard to the conclusion to which their Lordships have come upon the effect of the wakfnama it is unnecessary to deal with the question raised as to the position of Rahim Bibi as a *pardanashin* lady, upon which no issue was raised or tried in the lower court.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court, dated the 19th of March, 1929, should be set aside, and the decree of the Subordinate Judge, dated the 6th of July, 1925, restored. The respondents must pay the costs of the appellants in the High Court and before this Board.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Francis and Harker.*

APPELLATE CRIMINAL

Before Mr. Justice Pullan and Mr. Justice Niamat-ullah.

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Evidence Act (I of 1872), sections 24, 28—Confession—Induced by promise of pardon—Degree of proof necessary to establish inducement—Evidence Act (I of 1872), section 30—Retracted confession of co-accused—Value thereof—Corroboration necessary—Approver's evidence—Criminal Procedure Code, section 164—Extent of duty of Magistrate recording a confession—Identification—Value as corroborative evidence.

The retracted confession of a co-accused can undoubtedly be used or taken into consideration under section 30 of the Evidence Act as against the other accused, but it, like the evidence of an approver, is not sufficient for conviction unless it is corroborated in material particulars.

The evidence of an approver, coupled with the retracted confession of a co-accused, is not sufficient for conviction of an accused person if there is no other reliable evidence in corroboration as regards the identity of that accused person.

Where the identifying witnesses, in each case, picked out many more persons who were not at all connected with the crime than persons who were suspected, such reckless identification was valueless as corroborative evidence.

Section 24 of the Evidence Act does not require the same cogency of evidence as is necessary to establish a fact. It is almost impossible for the accused person to adduce any reliable direct evidence of maltreatment or inducement while he was in police custody. The section merely requires that if it "appears" to the court, i.e. if circumstances create a probability in the mind of the court, that the confession was improperly obtained, it shall be inadmissible in evidence.

Two persons who had been arrested in connection with a dacoity and been kept in jail for a few days, were put up before a Magistrate for recording their confessions under section 164 of the Criminal Procedure Code. As soon as the Magistrate put the usual questions and gave them the usual warning regarding the consequences of any confessions they might

*Criminal Appeal No. 1084 of 1931, from an order of H. P. Verma, Additional Sessions Judge of Meerut, dated the 7th of November, 1931.

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make, they refused to make any statement. They were then taken outside where they remained in the company of certain police officers for some minutes. They then returned and said that they would confess and their statements were recorded. One of them was subsequently made an approver but not the other, who retracted his confession at the trial. Regarding this confession it was *held* that the inference was irresistible from these events that a promise of pardon had been held out to them but the Magistrate's warning opened their eyes and they refused to make any confession until they were re-assured by the police officers outside that the Magistrate's warning was purely formal and of no significance. The confession in question was inadmissible in evidence by section 24 of the Evidence Act. Section 28 could not be applied because obviously the warning conveyed by the Magistrate did not remove the impression caused by the inducement.

It is not the function of the Magistrate, when he is to record statements under section 164 of the Criminal Procedure Code, to reduce to writing what the persons placed before him say only if they make statements which the police expect them to make and otherwise to make no note of anything which they say. It was the duty of the Magistrate to have kept a record of what the accused were asked and what they stated on the first occasion when they were placed before him and when they refused to make any confession.

Appeal from jail.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

PULLAN, J. :—Seven persons, Nazir, Jumma, Shera, Idu, Sukhan, Harbans and Pheru, have been convicted by the Sessions Judge of Muzaffarnagar of an offence under section 396 of the Indian Penal Code and have been sentenced each to 8 years' rigorous imprisonment. The prisoners have submitted appeals from jail against their conviction, and an application has been made in revision on behalf of the Local Government requesting this Court to enhance the sentences passed upon these persons.

A dacoity of a ferocious nature took place on the night of the 19th/20th of October, 1930, at the house of Prabhu Lal Vaish in the village of Kaserwa. The

dacoits, who are said to have numbered more than 30, were armed with guns, *lathis* and probably spears. Two men who interfered with them were shot dead, and another was beaten to death with *lathis*. The women were grossly ill-used, one or more were violated, and one was tortured. In my opinion a sentence of 8 years' rigorous imprisonment in such a case is inadequate. No sentence less than transportation for life should be imposed upon any of those persons who take part in a dacoity of this nature.

It does not appear that the learned Sessions Judge had any doubt that the persons whom he convicted were guilty, and he has praised the police officers who conducted the investigation for their good work. We regret that we have been unable to agree with the learned Judge either in his commendation of the police investigation or in the view taken by him as to the guilt of the majority of those persons whom he has convicted.

[After setting forth the earlier stages of the investigation the judgment proceeded.]

From this point onwards the investigation adopted the usual method of attempting to obtain confessions and basing the subsequent proceedings on those confessions. For the time being the persons arrested at Bhabisa made no confessions, but of those arrested in Loi, both Muhammad Ilias and Nazir made statements implicating themselves and others in the dacoity. In particular they implicated Fateh Muhammad who was arrested on the same day. Their statements led to the arrest of a sweeper named Jhandu, who has been acquitted, and Pheru and possibly Harbans, who are among the appellants. Ilias produced at the time of his arrest some silver articles, one "*jhanwar*" and six "*chhara*" which appear to agree with articles mentioned in the list of stolen property given by the complainant's brother on the 21st of October. Another silver article known as "*muthia*" was recovered from Nazir. But this article has been identified by no

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one as being part of the property stolen and cannot, therefore, be regarded as evidence against Nazir. Fateh Muhammad was found to be in possession of a gun, for which he has a licence. The six persons so arrested were sent together in a motor lorry to Muzaffarnagar and a Magistrate was asked to record the statements of Muhammad Ilias and Nazir. On the 15th of December, the statements of those persons were recorded in circumstances to which I shall refer later.

* * * *

On the 3rd of February, identification proceedings were conducted in jail by a Magistrate of the first class, Mr. Gobind Prasad Mathur. The persons put up for identification were Nazir, Junma, Nahar, Risal, Fateh Muhammad, Shera, Idu, Sukhan, Jhandu, Harbans, Pheru, Ilias, Baru and Aiman. The result of the identification is given in the report made by the Magistrate at the time. It is true that all the present appellants were identified by one or other of the witnesses, and the learned Sessions Judge has accepted these identifications as being evidence against them. There is nothing in the judgment to show that the identification is rendered valueless by the fact that the witnesses in every case picked out more persons who were not suspected than persons who were suspected, and in most cases were so reckless in their identification that they might well have made them blindfold. Thus Prabhu, the complainant, identified two of the accused persons and 14 who were not connected with the affair; Dalip identified 5 accused persons and 21 others; Fateh Singh identified 3 accused persons and 14 others. Those who were less reckless identified persons who have been acquitted, notably Fateh Muhammad, who is stated in the first confession of Ilias to have remained in a grove and not to have gone to the village, and has been acquitted by the Judge on the ground that he was implicated falsely out of enmity; and the best of all the witnesses, Faqira, made four mistakes as against

three identifications of persons who were suspected. The fact is that the identifications were carried out in circumstances that made a trustworthy identification very difficult. There were 15 persons put up for identification and 80 others. It is better in such cases to divide the numbers and have separate identifications of 10 or 15 persons containing two or three of the accused. In my opinion these identification proceedings are almost, if not quite, negligible. Faqira, the chaukidar, is the only one of the witnesses on whom I could place even the slightest reliance. Another witness, Hardeo, appears to have identified 5 persons suspected and 8 others. But it appears certain that of the five he had identified he knew Harbans before, and Fateh Muhammad was probably not present at the dacoity. Consequently his identification is of little value. But it is to be noticed that both he and Faqira identified Idu and Jumma, and that fact may be taken as a very slight corroborative evidence against those persons if there is sufficient evidence of a different nature against them.

* * * *

Muhammad Ilias was offered a pardon and examined on oath as an approver. The Judge is of opinion that Ilias has falsely implicated his personal enemy Fateh Muhammad, and it is easy to show from his statement that all the details that he has given as to the actual dacoity have been added to the original statement which he made before the Magistrate. The Judge has mentioned certain particulars from which he considers that the approver's statement has been corroborated. The first corroboration is found in the fact that he showed to Mr. Ganga Ram Yadav, Deputy Magistrate, the different places where the dacoits had collected and where he was standing at the time the dacoity was being committed. As no one saw Ilias at these places it is difficult to see how his statement has been corroborated by the fact that he showed certain places to the Magistrate. Secondly,

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the learned Judge says that his account of this dacoity is corroborated by other dacoity witnesses. This is true of his account as given in the sessions trial, but it is not true of the statement made by him before the Magistrate on the 15th of December, 1931, in which he gave no details. Thirdly, the Judge states correctly that his statement is corroborated by his production of a *jhanuar* and six *chharas* which, as I have already shown, correspond to articles mentioned in the list given by the complainant on the 21st of October. Fourthly, the Judge refers to a confession made by Nazir on the same day, to which I shall refer later; and lastly, he has referred to the identification of Ilias by certain witnesses. On this identification I have already commented. In my opinion the statement of the approver has very little corroboration.

* * * *

At this point it is necessary to consider the weight, if any, to be attached to the confessions made and retracted by Nazir and Idu, as against their co-accused. Undoubtedly a retracted confession by a co-accused can be used under section 30 of the Evidence Act, but such confessions vary greatly in the value to be attached to them. The confession of Nazir was made in the following circumstances. Ilias and Nazir are closely connected, Nazir being a dependent of Ilias, who is a petty zamindar. They were arrested on the same day and sent to jail together. They stayed there four days and were then put up before a Magistrate. As soon as they were warned by the Magistrate of the effect of their statements they refused to confess. They were taken outside where they remained in the company of certain police officers for seven minutes. They then returned and said that they would confess, and their statements were recorded. The only construction to be placed upon these events is that these men expected a pardon and when the Magistrate told them that they would not be pardoned they refused to make any statement until they were reassured by the police officers outside that the questions

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put to them and the warning given to them were purely formal. In the case of Ilias, who was subsequently made an approver, it matters little that he made his first confession after receiving some promise of a pardon, but the same does not apply to Nazir. If, as I believe, his statement is made on the strength of an inducement given to him five minutes before, his statement cannot be taken in evidence as against the persons named by him as his accomplices. The case of Idu is somewhat different. Idu did not make any confession till he had been in jail for nearly six months. It appears that in the month of March he expressed his willingness to make a confession as to this and another dacoity, and finally on the 5th of May he made a long statement to a Magistrate in which he described in detail the Kaserwa dacoity and the part played in it by himself . . . But in any case Idu's confession is not one which can be relied upon as against his co-accused.

* * * *

There remain the cases of the two persons who made confessions and retracted them. I have already stated the circumstances in which Nazir made his confession. It appears that it was a confession made on an inducement by some person in authority and as such is inadmissible in evidence under section 24 of the Indian Evidence Act. Section 28 cannot be applied in this case because there is every reason to believe that the warning conveyed by the Magistrate did not remove the impression caused by the inducement. If his own confession is not admitted in evidence against him there remains only the statement of Ilias and the confession of Idu. In my opinion no reliance can be placed on Idu in respect of the names given by him. Consequently when he says that Nazir took part in the dacoity this is not a statement which can be regarded as evidence against Nazir . . . Seeing that Nazir is a retainer of Ilias and was clearly acting throughout under his influence and suggestion I cannot say that I have no doubt as to his guilt in spite

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of his confession, and I consider that he is entitled to an acquittal.

There remains only Idu. I cannot find any reason for discarding Idu's confession as against himself. It was made voluntarily and at his own express wish because he hoped to be made an approver, but I am satisfied that no promise was ever made to him that he would be an approver, and he gives details in his confession which clearly indicate that he was one of the dacoits. Moreover, the two least unreliable witnesses both identified him in jail. In my opinion, therefore, all of the appellants except Idu must be acquitted. In the case of Idu I would accept the Government's application for revision and enhance his sentence to transportation for life. It is unfortunate that in a case of this kind only one man should have been brought to justice, but this is bound to happen so long as the investigating officers are satisfied when they obtain a confession and base their case on that confession irrespective of the fact that the man who has made the confession is in no way a reliable person and has done nothing to assist in the proper investigation of the case. In my opinion Ilias should never have been offered a pardon after the investigating authorities had time to consider the effect of the statement made by him before a Magistrate and the circumstances in which it was made. I do not wish to criticize too severely the learned Sessions Judge who has no doubt tried to come to a proper finding in the case and has honestly believed that the persons whom he has convicted were guilty, but it is the duty of the Judge in all cases to state fairly the evidence both for and against each of the accused persons, and this the Judge has not done. However anxious a Judge may be that his decision should be upheld on appeal he should never attempt to secure this aim by making the case against an accused person appear to be stronger than the evidence justifies.

NIAMAT-ULLAH, J. :—[After setting forth certain facts the judgment proceeded.]

The principal evidence on which the conviction of most of the appellants rests is the statement of the approver Ilias. It is now settled law that, unless an approver's testimony is corroborated not only as regards *corpus delicti* but also as regards the identity of each accused person, conviction is not justified. The finding of the learned Sessions Judge that the approver Ilias took part in the dacoity is based on sufficient evidence and may be safely accepted. The more important question, however, is whether all those whom the approver implicates have been proved to have taken part in the dacoity. He must be corroborated as regards each accused, even if his evidence is not open to serious challenge in any material particular, which is by no means true in the case of Ilias. * * *

Besides the evidence of the approver, we have the retracted confessions of Nazir and Idu implicating not only themselves but also their co-accused. For reasons which will appear presently, I agree with my learned brother in holding that Nazir's confession should be excluded altogether not only so far as other accused are concerned but as against himself also. Idu's retracted confession, if found to be voluntary and admissible in evidence, is an important piece of evidence against himself; but as against his co-accused, the court can only "take it into consideration". The retracted confession of a co-accused, like the evidence of the approver, is not sufficient for conviction, unless it is corroborated in material particulars; see *Emperor* v. *Kalwa* (1).

Another question which requires consideration in the present case is whether, if there is no other reliable evidence in corroboration, the evidence of the approver, coupled with the retracted confession of a co-accused, is sufficient for conviction. There is ample authority in support of the view that it is not. It has been expressed in the dictum that one tainted testimony cannot corroborate another tainted testimony. Numerous cases bearing

(1) (1926) I.L.R., 48 All., 409.

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on this point have been quoted in the Law of Evidence by Woodroffe and Ameer Ali under section 30, at pp. 314-315, 9th edition, wherein it is stated that "The confession of co-prisoners, to be rendered trustworthy, must be corroborated *aliunde* by independent evidence and not by the testimony of accomplices or approvers, as well in respect of the identity of all the persons affected by it as of the *corpus delicti*." It stands to reason and common sense that if the approver's evidence itself is not sufficient for want of corroboration, the retracted confession of a co-accused, which again has been declared to be equally if not more untrustworthy, does not furnish the requisite corroboration. The two together cannot obviate the necessity of corroboration from independent sources. The corroboration need not be full proof of guilt but should establish a sufficient degree of complicity. The whole principle of the rule which insists on corroboration of the approver or of the retracted confession of a co-accused is based on the assumption that, in the absence of a guarantee forthcoming from more trustworthy sources, the evidence of the approver or the retracted confession or both together cannot suffice for conviction.

With the above general remarks I shall consider the case of individual accused persons.

To take the case of Nazir first, he is said to have been arrested on the 10th of December, 1930. Ilias was also arrested on the same date. An application was made by the Circle Inspector requesting that their statements be recorded under section 164 of the Criminal Procedure Code. Chaudhri Ganga Ram Yadav, Magistrate, accordingly sent for them on the 15th from the jail lock-up where they had been kept under the orders of a Magistrate, and their statements were recorded. Nazir made a confession much to the same effect as Ilias did. Ilias, to whom a pardon was subsequently offered, adhered to his confession. Nazir, however, retracted it when examined

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as an accused before the committing Magistrate. In explaining his confession before the Sessions Judge he alleged that he had been subjected to ill-treatment by the Sub-Inspector, Aslam Khan, and that he made the statement which Aslam Khan desired him to make. He examined a witness, Hamid Ali Khan, who deposed that Ilias and Nazir were taken before the Magistrate for record of their confessions but they refused to make any and that subsequently Sub-Inspector Aslam Khan induced them to confess, promising to secure a pardon for each of them. Hamid Ali Khan has been disbelieved by the learned Sessions Judge for reasons given in his judgment. I am prepared to accept his view in that respect. But I am somewhat surprised at the remark of the learned Judge that "there is absolutely nothing suspicious about this confession." Nazir too, like Ilias, remained in jail for four days before his confession, and it appears, apart from what the defence witness Hamid Ali Khan stated, that both of them, when placed before the Magistrate for making confessions, refused to make any incriminating statement. This was elicited from Chaudhri Ganga Ram Yadav, Magistrate, who was examined as a witness both before the committing Magistrate and the Sessions Judge. It is to be regretted that Mr. Yadav did not record any proceedings of what transpired when Ilias and Nazir were first placed before him for their confessions being recorded. Section 164 of the Criminal Procedure Code provides for "confessions" or "statements" of persons willing to make them being recorded. It is clear that the police expected that Ilias and Nazir would make confessions, otherwise the Magistrate would not have been moved to send for them and record their statements. The Magistrate having agreed to take proceedings under section 164 and sent for them, it is highly probable that he put the usual questions warning them of the consequences of their making confessions, whereon they refused to make any incriminating statement. It is clearly not the function of the Magistrate, when he is to record statements under

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section 164, to reduce to writing what the persons placed before him say only if they make statements which the police expect them to make and otherwise to make no note of anything which they say. The learned Sessions Judge has given some reasons for disbelieving the witness Hamid Ali, who stated that Ilias and Nazir first refused to make confessions but were subsequently induced to make them; but he makes no mention of the facts stated by Chaudhri Ganga Ram Yadav. I do not think that the Sessions Judge, who himself recorded his statement, could have forgotten what he said, nor do I believe that he failed to appreciate the importance of facts stated by him.

It was clearly the duty of Chaudhri Ganga Ram Yadav to have kept a record of what the accused were asked and what they stated on the first occasion when they were placed before him and when they refused to make any confession. As it is, we can only have such details of what happened on that occasion as Mr. Yadav could depose from memory on the 26th of October, 1931, over ten months afterwards. This is what was elicited from him in cross-examination :—

"Ilias was sent to jail under a warrant dated the 11th of December, 1930, and on it there is my order dated the 11th of December, 1930, that inasmuch as the statement of Ilias was to be recorded on the next day and so he was to be kept separate from other prisoners. This warrant does not bear my signature. It bears the signature of Khan Bahadur Mustafa Saheb, Deputy Magistrate. I cannot say if the application by the police to record the statement of Ilias was oral or in writing. On the 15th of December, when I wanted to record the statements of Ilias and Nazir they did not at first want to make any statement. So far as I remember, the police was present outside the court room. When they did not want to make any statement, they were sent out of the court room. A little after, within five or seven minutes, they came back again, of course under the police guard,

and they said that they would give their statements. I cannot say what policemen were present outside the court room. But I remember that on that day, before their statements were recorded, Aslam Khan, Sub-Inspector of Shamli, came to me and asked me if the statements of Ilias and Nazir were recorded, and I replied that they were to be recorded on that day. During the five or seven minutes that Ilias and Nazir went out of the court room, they were in the custody of police guard. I must state here that when they returned to the court room the second time, they were given full time to wait and think, and thus only their statements were recorded when they insisted that their statements should be recorded. I did not certainly put down the question to them as to why they were making a free and voluntary statement. There is no note of mine that they refused to make any statement and that it was written when they persisted. When they first came and refused to make any statement, they were told to go away."

The above statement was recorded by the learned Sessions Judge himself, and if he had applied his mind to all the circumstances, beginning with the arrest of Ilias and Nazir on the 10th, the request of the police that their confessions be recorded, their being kept separate from other under-trial prisoners under the orders of a Magistrate, their refusal to make a confession when first questioned and their readiness after a few minutes, which they spent in police custody, to make confessions, and the confession itself in the case of Nazir followed by a retraction when pardon was given to Ilias and not to Nazir, the learned Sessions Judge would not have made the remark which I have quoted above, namely that there was nothing suspicious about the confession. To my mind, the inference is irresistible that a promise of pardon had been held out to Nazir and Ilias, and relying on that promise they agreed to make confessions. The police requested, on the faith of their readiness to confess,

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that their statements be recorded. The effect of the promise lasted on their minds till they were placed before the Magistrate, whose warning opened their eyes and they refused to make any confession. Subsequently they were persuaded to believe that the warning given by the Magistrate was of a stereotyped and formal character and should carry no significance. Nazir made a confession, but subsequently, when he discovered that Ilias was the favoured individual and that no pardon would be given to him, he retracted.

Section 24 of the Indian Evidence Act does not require the same cogency of evidence as is necessary to establish a fact. It merely requires that if it "appears" to the court that a confession was induced by threat or promise proceeding from a person in authority in relation to the charge against the accused, it shall be inadmissible in evidence. It has been held in numerous cases that if circumstances create a probability in the mind of the court that the confession was improperly obtained, it should be excluded from evidence. In the present case, as already stated, the circumstantial evidence is so strong as to establish the fact that Nazir was induced to make a confession by a promise of pardon held out by the police. A very eminent Judge of this Court expressed himself on the subject of retracted confession in the following terms :

"To repeat a phrase I used on a former occasion, instead of working *up* to the confession they (the police) work *down from* it, with the result that we frequently find ourselves compelled to reverse convictions simply because, beyond the confession, there is no tangible evidence of guilt. Moreover, I have said and I repeat now, it is incredible that the extraordinarily large number of confessions which come before us in the criminal cases disposed of by this Court, either in appeal or revision, should have been voluntarily and freely made in every instance as represented. I may claim some knowledge of, and acquaintance with, the ways and

conduct of persons accused of crime, and I do not believe that the ordinary inclination of their minds, which in this respect I take to be pretty much the same with humanity all the world over, is to make any admission of guilt. I certainly can add that during fourteen years' active practice in the criminal courts in England I do not remember half a dozen instances in which a real confession, once having been made, was retracted. In this country, on the contrary, the retraction follows almost invariably as a matter of course, and though I am well aware how this is sought to be explained by a suggestion of the influence brought to bear upon the confessor by other prisoners in *havalat*, the fact remains as an endless source of anxiety and difficulty to those who have to see that justice is properly administered." [*Per* STRAIGHT, A. C. J., in *Queen-Empress* v. *Babu Lal* (1).]

The remarks hold good today no less than they did when they were made by STRAIGHT, A. C. J. I respectfully agree with every word of what he said. In most cases of serious gravity or difficulty we are faced with the problem of retracted confession and the value to be assigned to it against the person making it or his co-accused. In a large number of such cases there is little or no reliable evidence in corroboration. To do lip service to the doctrine which requires corroboration and to accept such evidence in corroboration, for the sake of formality, as a Judge would not conscientiously believe, is not in keeping with judicial integrity.

It has been stressed over and over again that when a confession is made and subsequently retracted the committing Magistrate and the Sessions Judge should inquire into all the circumstances in which it was made and those in which it was subsequently retracted. One, however, seldom comes across a case in which any serious effort is made either by the Magistrate or the Sessions Judge to explain the phenomenon that a person who took every precaution of concealing his crime and

(1) (1884) I.L.R., 6 All., 509 (542, 543).

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suppressing evidence which could implicate him becomes so full of remorse and penitence when he comes face to face with the police that he makes a "free and voluntary confession", but subsequently retracts it at the inquiry, the remorse and penitence, which are supposed to have acted on his mind before, ceasing to influence it in the slightest degree. While it is true that in some cases voluntary confessions are made and while it is permissible for police officers to resort to legitimate devices to obtain useful information from prisoners, it is inconceivable to me, as it was to STRAIGHT, A. C. J., that ordinarily a dacoit or murderer would make a voluntary confession. It is, therefore, necessary that when a confession is first made and is subsequently retracted with allegations against the police, the Magistrate and the Sessions Judge should probe the matter for their own satisfaction. What is, however, done in practice is to record a confession with due formalities and subsequently to record the retraction thereof, leaving it to the accused to get over, if he can, the effect of the confession which stands against him in spite of retraction. It is impossible for the accused, even if he is defended, to adduce any reliable direct evidence of maltreatment or inducement while he was in police custody. His allegations, when put to the investigating officers, are naturally denied. But the matter should not be allowed to rest there. The Judge, with whom the responsibility lies for acting upon the confession, should satisfy himself by putting searching questions to such witnesses as had anything to do with the confession. The first question that ought to strike every Judge is, "Why the accused made the confession?" It is very important to ascertain, from those in whose custody the accused was, the circumstances in which the question of confession first arose, how the accused expressed his willingness to be placed before the Magistrate and his readiness to make a confession. Similar questions arise as regards retraction. It is only if circumstances make it reasonable to believe that the accused

voluntarily made the confession and agreed to make it before the Magistrate that an inquisitive mind can be satisfied. In the present case the statement of the investigating officer, made before the Sessions Judge, does not betray the slightest anxiety on the part of the learned Sessions Judge to elicit any information as regards those circumstances. Such of them as could be ascertained from the record failed to attract his attention. For all these reasons, I am in entire agreement with my learned colleague in holding that Nazir's confession is wholly inadmissible in evidence and should be excluded from consideration.

As regards the confession of Idu, the case is different so far as he is himself concerned; but I am not prepared to give much weight to it as against his co-accused . . . Idu's confession, so far as he is himself concerned, may not be open to any criticism; but I am not prepared to hold that the long and systematic confession, in which he implicates a large number of other persons including the appellants, could emanate in that form from his brain alone. While I am prepared to take it into consideration under section 30 of the Indian Evidence Act against his co-accused, I am not prepared to give it much weight as against them.

I have already expressed the view, in an earlier part of this judgment, that the evidence of the approver, coupled with the retracted confession of a co-accused, but uncorroborated by other evidence, is not sufficient for conviction of the co-accused. There is an additional reason in this case, namely that Idu's retracted confession as against his co-accused is otherwise untrustworthy. Nazir's own confession having been excluded, there is no evidence against him, except that of the approver and the retracted confession of Idu. No stolen property, identified as such, has been traced to his possession.

As regards the appellants other than Idu, my learned brother has discussed the evidence in detail as against

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each and has shown that there is no evidence against any of them, except that of the approver and the retracted confession of Idu.

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The so-called evidence of identification is of no value whatever. It is difficult to believe that, in ordinary circumstances, victims of a dacoity having had occasion to see some of the dacoits mostly in darkness for a short time can be in a position to identify them months afterwards in different surroundings. In this case 15 accused were mixed up with 80 under-trial prisoners, and witnesses were asked to identify dacoits. The result was perfectly ridiculous. For instance, Parbhu witness picked out 16 persons, of whom only two were accused; and Hardeva witness picked out 13, of whom five were accused. Kabul picked out 22, of whom only four were accused. The witness who made the least mistake was Faqira who picked out seven, of whom three were accused. No reliance whatever can be placed upon such evidence and it is obvious that it has no value as affording corroboration to the approver's statement. The learned Sessions Judge does not even refer to this class of evidence and relies on the evidence of identification in court, when the accused were the only persons to be identified. It is equally valueless.

The most important corroboration would have been that afforded by evidence of recovery from the possession of the accused of some property stolen in course of the dacoity. As my learned colleague has shown in his judgment, there is no satisfactory evidence of this kind.

In the circumstances stated above I agree that the convictions of the appellants other than Idu cannot be sustained. As regards Idu, we have his own confession, besides the evidence of the approver, and there is no justification for rejecting his own confession though retracted. I agree in upholding his conviction and enhancing his sentence to transportation for life, which is the only proper sentence having regard to the gravity of the offence. I also agree in acquitting the rest of the appellants.

REVISIONAL CRIMINAL

Before Mr. Justice Pullan and Mr. Justice Thom

EMPEROR *v.* FATTU AND OTHERS*

1932
August, 30

Indian Penal Code, section 225B—Rescuing arrested person —Warrant of arrest not addressed to any person by name or designation—Arrest illegal—Civil Procedure Code, order XXI, rule 37—Simultaneous issue of notice and warrant—Warrant illegal.

A warrant must be issued to some person for execution; where no name or designation of that person is given in the warrant, the warrant is defective and the arrest unlawful. The rescue of the person arrested under such warrant is no offence under section 225B of the Indian Penal Code.

Where a notice is issued under order XXI, rule 37 of the Civil Procedure Code a simultaneous issue of a warrant is illegal and an arrest thereunder is unlawful; in such a case the warrant can be issued, under clause (2) of the rule, only upon failure of the judgment-debtor to comply with the notice.

Mr. *Masud Hasan*, for the applicants.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

PULLAN and THOM, JJ.:—This is an application in revision from an order of the Sessions Judge of Meerut, who confirmed the conviction and sentences passed upon the seven applicants for an offence under section 225B of the Indian Penal Code. A warrant was issued by a revenue court for the arrest of one Sarup Singh. Sarup Singh was arrested, but he was rescued from the peons who arrested him. These facts may be taken as admitted.

This application in revision challenges the legality of the warrant. This objection is twofold. In the first place, the warrant does not disclose the name or official designation of the person to whom the warrant

*Criminal Revision No. 95 of 1932, from an order of Tirloki Nath, Sessions Judge of Meerut, dated the 11th of January, 1932.

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was issued for execution, and secondly the warrant was served simultaneously with a notice under order XXI, rule 37, of the Civil Procedure Code.

In our opinion the warrant was defective for both the reasons stated by the learned counsel. A warrant must be issued to some person for execution; and where no name or description of that person is given in the warrant, the person arrested can have no knowledge that the persons who present the warrant are legally authorised to do so. It may be that the person who is arrested is unable to read the warrant and has no knowledge as to whether the warrant is or is not properly filled up; but it is the duty of the court to issue a warrant in proper form, and where a warrant is incomplete, it has been held by more than one High Court that the subsequent release of a person arrested under such a warrant is not an offence under section 225B of the Indian Penal Code. There is a very recent decision on this point by a learned Judge of this Court reported in *Jāgannath* v. *King-Emperor* (1). In that case a warrant had been issued to the Nazir, and the Nazir without any endorsement made it over to a subordinate official. It was held that the warrant was defective and did not authorise the person who directed the peons to make the arrest, and that accordingly an escape from custody in such a case was no offence. In our opinion the learned Judge decided that case on correct principles, and the present case is a stronger one, for in this case the column which should contain the name of the person to whom the warrant was issued for execution is blank. There is a parallel case recently decided by the Patna High Court, *Badri Gope* v. *King-Emperor* (2), in which a warrant, otherwise complete, was defective, as it was afterwards found that the seal of the court was missing. Although this fact was not known to the persons who rescued the person arrested,

(1) [1932] A.L.J., 179.

(2) A.I.R., 1926 Pat., 237.

the court held that, as the warrant was defective, they had committed no offence under section 225B.

The second objection to this warrant raises a point which, as far as we are aware, has not previously been before any High Court. Under rule 37, order XXI of the Civil Procedure Code a court may, instead of issuing a warrant for arrest, issue a notice calling upon the judgment-debtor to appear before the court on a date specified in the notice and show cause why he should not be committed to the civil prison. The second clause of this rule reads as follows: "Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor." In the present case the court adopted what is, in our opinion, a most improper procedure. It issued simultaneously a notice calling upon the judgment-debtor to appear before the court on the 30th of April, and a warrant for his arrest. Both the notice and the warrant were served on the 19th of April. In our opinion this rule is clear. There were two courses open to the court; either it could issue a warrant of arrest, or it could issue a notice giving the judgment-debtor a date on which to appear in court. If the court follows the second mode of procedure, the question of arrest could only arise when the judgment-debtor fails to comply with the notice. On the 19th of April the judgment-debtor had still eleven days within which to comply with the notice, and his arrest within that period was illegal, for the court by adopting this procedure had taken away its own right to issue a warrant of arrest before the 30th of April.

We cannot emphasize too strongly our feeling that in all these matters of the arrest of a judgment-debtor the procedure laid down in the Code must be carefully observed by the courts. The liberty of the subject cannot be trifled with, and every judgment-debtor can require by right that the court ordering his arrest shall

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observe to the letter the law as laid down in the Code. In the present case we consider that the warrant was defective in itself, and its issue was illegal. Consequently we have no hesitation in finding that the persons who released this judgment-debtor from custody were not rescuing a person who was under a lawful arrest, and therefore, they committed no offence under section 225B of the Indian Penal Code. We accordingly accept this application in revision, set aside the judgments of the courts below and quash the conviction and sentences.

Before Mr. Justice Pullan and Mr. Justice Thom

1932
August, 30

EMPEROR *v.* KAUL AHIR*

Arms Act (XI of 1878), section 19(f)—"Possession"—Two loaded cartridges found in a corn bin—Whether the head of the family can be convicted thereupon.

A house was searched and two loaded cartridges were found in a corn bin among ghee, butter and other articles. The Magistrate convicted the head of the family on the ground that as such he should be held responsible for the ammunition recovered from his house. It was *held* that in such a case it could not be said that the head of the house or any individual male member of the family was aware of the presence of these cartridges, and that in all such cases it was necessary to prove not only the presence of the article in the house but the possession of some particular person over that article in order to justify a conviction.

Emperor v. *Sikhdar*, I. L. R., 54 All., 411, dissented from.

This case was referred to a Bench of two Judges on the following referring order :—

IQBAL AHMAD, J. :—I find it difficult to reconcile the decision of this Court in *Emperor* v. *Ram Autar* (1), with the decision of this Court reported as *Emperor* v. *Sikhdar* (2). The question that arises for consideration in the present reference is of sufficient importance to merit a discussion before two Judges. Accordingly I refer this case to a Bench of two Judges.

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*Criminal Reference No. 266 of 1932.

(25) I.L.R., 47 All., 511. (2) (1931) I.L.R., 54 All., 411.

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EMPEROR v. KAUL AHIR

Mr. *L. M. Roy*, for the applicant.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

PULLAN and THOM, JJ. :—The learned Sessions Judge of Azamgarh has referred to this Court the case of one Kaul Ahir who has been convicted of an offence under the Arms Act. In the course of a house search two loaded cartridges were found in a corn bin in the house of this man Kaul among ghee, butter and other articles. Kaul and his son were prosecuted for an offence under the Arms Act. The son Lagan was acquitted, and the Magistrate has convicted Kaul on the ground that he was the head of the family and should, therefore, be held responsible for the arms recovered from his house. There are many cases of this Court in which it has been laid down that it is improper to convict each and every member of a Hindu joint family because some illicit article has been recovered from the house, and the principle that the head of the family is responsible where there are other adult male members who had equal facilities of access to the article in question has never been affirmed as far as we are aware by any High Court in India. We have been referred to a decision of a single Judge of this Court in the case of *Emperor* v. *Sikhdar* (1). In that case the learned Judge held that all the adult male members of a Hindu joint family could be presumed to be in possession of an unlicensed gun found in their house, and it was open to the police to prosecute one or all of them for the offence. This is a view we are not prepared to accept. We believe that in all such cases it is necessary to prove not only the presence of the article in the house, but the possession of some particular person over that article in order to justify a conviction. In a case such as the present it cannot be said that the head of the house or any individual male member of his family was aware of the presence of these cartridges. For all we know they might have been dropped by some

(1) (1931) I.L.R., 54 All., 411.

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sportsman, picked up by a child and handed over to the child's mother. It is the women of the house and not the men who look after the grain bin and the ghee and the butter and other articles, and the possession of these cartridges may have been entirely innocent. We cannot accept the view that the head of the family is responsible for the presence of the articles, and we do not consider that the conviction for an offence under the Arms Act is legal. We accordingly accept this reference, set aside the conviction and sentence and direct that if the fine has been paid it shall be returned.

Before Mr. Justice Pullan and Mr. Justice Thom

1932
September, 1

BADRI PRASAD *v.* JHAMMAN*

Criminal Procedure Code, section 539A—Affidavit by accused person in support of an application for transfer—Affidavit containing false allegations against conduct of public servant—No immunity from prosecution for perjury—Indian Penal Code, sections 193, 199.

Section 539A of the Code of Criminal Procedure applies to any person who chooses to make allegations respecting a public servant and in support of those allegations swears an affidavit. There is nothing to show that the section does not apply to an accused person, and if he swears a false affidavit he is liable to be prosecuted for perjury.

Emperor v. *Matan*, I. L. R., 33 All., 163, declared obsolete.

This case was referred to a Bench of two Judges on the following referring order:

KING, J.:—This is an application in revision against an order passed by the learned Sessions Judge of Budaun rejecting an application for revision of an order of acquittal under sections 193 and 199 of the Indian Penal Code.

It appears that one Jhamman was being tried before a Tahsildar Magistrate for an offence under section 323 of the Indian Penal Code, and while the trial was pending Jhamman made an application to the District Magistrate asking that the case should be transferred from the court of the Tahsildar

*Criminal Revision No. 327 of 1932, from an order of Radha Kishen, Session Judge of Budaun, dated the 2nd of April, 1932.

on the ground that the Tahsildar was siding with the complainant who was an influential person, and that the Tahsildar had openly stated in court that if the accused did not pay Rs.100 as compensation to the complainant he (the Tahsildar) would convict him. The District Magistrate obtained an affidavit from Jhamman in support of these allegations and then called for a report from the Tahsildar from which it appeared that the allegations made by Jhamman were false. The District Magistrate accordingly rejected the application for transfer and ordered that Jhamman should be prosecuted under sections 193 and 199 of the Indian Penal Code.

When Jhamman was tried for the offences mentioned above, the trial court found on the strength of certain rulings of this High Court that even if the facts alleged in the affidavit were false nevertheless he was immune from prosecution. The matter was taken up to the Sessions Judge in revision but he also came to the conclusion in view of the authorities cited that the accused had been rightly acquitted.

For the applicant a case decided by a single Judge, *Baddu Khan* v. *Emperor* (1), has been relied upon and it is directly in point. In that case it was held that according to the practice approved by the Allahabad High Court an accused person can legally tender his own affidavit in support of an application for transfer, whether the affidavit is tendered and the application made in a subordinate court or in the High Court, and he can be prosecuted in regard to any false statement made in the affidavit. Several other rulings have been cited which take the same view, namely *Ghulam Muhammad* v. *The Crown* (2); *Crown* v. *Pir Qadir Bakhsh Shah* (3) and *Mt. Allah Wasai* v. *Emperor* (4). On the other hand we have a ruling of two Judges of this Court in *Emperor* v. *Matan* (5) which clearly supports the view taken by the two courts below to the effect that the accused is immune from any prosecution in respect of any false statement which he may make in an affidavit supporting his application for transfer. The same view was taken by single Judges of this Court in *Emperor* v. *Bindeshri Singh* (6) and *Ram Prasad* v. *King-Emperor* (7).

As there is a clear conflict of opinion between the decisions of this High Court, and one of the decisions is by a Bench

(1) A.I.R., 1928 All., 182.
(2) (1922) I.L.R., 3 Lah., 46.
(3) (1924) I.L.R., 6 Lah., 34.
(4) A.I.R., 1926 Lah., 12.
(5) (1910) I.L.R., 33 All., 163.
(6) (1906) I.L.R., 28 All., 331.
(7) (1912) 10 A.L.J., 462.

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BADRI PRASAD v. JHAMMAN

of two Judges, I refer the case to a Bench of two Judges as it would not be proper for me to dissent from the judgment of a Division Bench of this Court.

Mr. *A. P. Pandey*, for the applicant.

Dr. *N. U. A. Siddiqui*, for the opposite party.

PULLAN and THOM, JJ. :—This is an application made by one Badri Prasad for revision of an order of acquittal passed against Jhamman in a case of perjury. Jhamman was accused of some petty offence in the court of the Tahsildar Magistrate. He swore an affidavit in connection with an application for transfer of the case, in which he made certain allegations about the presiding officer. It is in respect of this affidavit that he was prosecuted for offences under sections 193 and 199 of the Indian Penal Code.

The Magistrate and, in revision, the learned Sessions Judge believed that the case should be decided in the same way as the case of *Emperor* v. *Matan* (1) was decided by a Bench of this Court in the year 1910. The opinion held by that Bench was that no accused person could be prosecuted in respect of any statement made by him for the purpose of his defence, and an application made for transfer was made by the accused person in pursuance of his defence. At that time an accused person could not take oath under any circumstances. We see no reason to differ from the view taken by the Bench of this Court in that case at that time; but section 539A has been enacted in the year 1923, and there is nothing to show that that section does not apply to an accused person. In our opinion it applies to any person who chooses to make allegations respecting a public servant and in support of those allegations swears an affidavit. If an accused person chooses to come within the scope of this section and swears an affidavit on false facts, we consider that he should be liable to punishment which can be inflicted upon persons who swear such false affidavits. As pointed out by the learned Judge of thi-

(1) (1910) I.L.R., 33 All., 163.

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Court who referred this matter to a Bench, this view has already been taken in other High Courts, and we are of opinion that in view of the change of law the judgment of the Bench in the case of *Emperor* v. *Matan* (1) need no longer be followed.

In the present case we consider that the matter has gone far enough, and we do not propose that this case should go back for decision on the question which has not yet been tried, namely whether the affidavit was or was not false. With these observations we direct that the record be returned.

APPELLATE CRIMINAL

Before Mr. Justice Pullan and Mr. Justice Thom

EMPEROR *v.* RAM CHAND AND OTHERS *

1932
September, 2

Indian Penal Code, section 395—Dacoity—Resistance or violence not a necessary ingredient.

In a case of dacoity the circumstance that the inmates of the house, seeing the large number of the dacoits, do not offer any resistance and no force or violence is required or used does not reduce the dacoity to a theft.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

Appeal from jail.

PULLAN and THOM, JJ. :—This is an appeal by three persons, Ram Chand, Reoti and Munshi, who have been convicted of an offence under section 380 of the Indian Penal Code and each sentenced to three years' rigorous imprisonment. They had been charged originally under section 395 of the Indian Penal Code, and when their appeals were read by a Judge of this Court notice was issued to all three appellants to show cause why their

*Criminal Appeal No. 45 of 1932, from an order of Govind Sarup Mathur, Sessions Judge of Mainpuri, dated the 23rd of November, 1931.

(1) (1910) I.L.R., 33 All., 163.

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sentence should not be enhanced. This is a very clear case of dacoity. In the first report it was said that there were 14 or 15 dacoits, and the approver, whose evidence has been believed by the Judge, says that there were 12. They entered the house in the night and they took ornaments and a considerable sum of money. It is said that they took Rs.2,000 in cash and ornaments worth Rs.164. There is nothing in the method in which the offence was committed to distinguish it from an ordinary dacoity, and the evidence against all these persons is particularly clear. Munshi himself made a confession which he retracted, and he is also mentioned by the approver whose name is also Munshi. He was identified by several witnesses. The other two appellants were mentioned both by the approver and by Munshi Kachhi in his retracted confession, and stolen ornaments were found in the possession of both of them.

The Judge has laid down a proposition of law which cannot possibly be accepted. He has said: "Probably the inmates did not resist the dacoits, seeing their large number, and so peacefully and calmly without using any force or show of force the dacoits acquired the property, and so the offence comes technically within the purview of section 380 of the Indian Penal Code." If this were so, any dacoity in which no resistance is offered and no violence required will cease to be a dacoity and should be treated as a theft. This decision of the learned Judge shows that he has entirely failed to understand a section of the Indian Penal Code which in the district of Mainpuri, where he is the Sessions Judge, he must have occasion to use almost daily. We cannot alter the section under which he has chosen to convict these persons, and no doubt they are guilty under that section as in the course of committing the dacoity they also committed theft from a building. All that we can do is to emphasise our opinion that the view taken by the learned Judge is entirely wrong, to dismiss the appeal and to enhance the sentence under section 380 of the Indian Penal Code to

five years' rigorous imprisonment in the case of each of the appellants.

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EMPEROR
v.
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REVISIONAL CRIMINAL

Before Mr. Justice Pullan

EMPEROR *v.* GURDIAL AND OTHERS *

1932
October, 5

Indian Penal Code, section 424—Removal of crops attached in execution of decree—Warrant of attachment executed after the date on which it was returnable—Attachment invalid and removal no offence—Civil Procedure Code, order XXI, rule 24(3).

The provisions of order XXI, rule 24(3) of the Civil Procedure Code are mandatory and where the process has a date fixed for its return under this rule it cannot be executed after that date. So, where property is attached after the date fixed for the return of the warrant of attachment, the property is not lawfully attached and the owner does not commit an offence under section 424 of the Indian Penal Code by removing the attached property from the possession of the custodian and taking it into his own use.

Mr. *K. D. Malaviya*, for the applicants.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

PULLAN, J. :—This is an application in revision of an order of the Sessions Judge of Mainpuri. The four applicants are cultivators whose crop was attached in execution of a decree and they have been prosecuted under section 424 of the Indian Penal Code for removing that crop from the possession of the *shahna*. The main ground for revision of the order is that the warrant of attachment was returnable on the 12th of April, 1932, and the attachment was made on the 15th of April, 1932. The warrant, therefore, had no force on

*Criminal Revision No. 612 of 1932, from an order of Babu Ganga Prasad Varma, Sessions Judge of Mainpuri, dated the 6th of August, 1932.

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the date on which the attachment was made, and it is argued on behalf of the judgment-debtors that in these circumstances they committed no offence when they removed the crop from the possession of the *shahna* on the 18th of April. The Sessions Judge would not consider this point, because in his opinion once the attachment had been made and no application was made by the judgment-debtors to challenge its legality, they could not lawfully remove the crop and they are, therefore, guilty of an offence under section 424 of the Indian Penal Code in that they dishonestly removed their own property. The provisions of order XXI, rule 24, are mandatory and clause (3) as applied to this High Court runs: "In every such process a day shall be specified on or before which it shall be executed and a day shall be specified on or before which it shall be returned to the court." It appears to me that where the process has a date fixed for its return under this section it cannot be executed after that date, and any person whose property is attached after the date fixed for the return of the process may, when charged with a criminal offence under section 424 of the Indian Penal Code, say that this property had never been lawfully removed from his possession and that therefore he can commit no offence by taking the property in his own use. This appears to be the view taken by the Calcutta High Court in the case of *Sheikh Nasur* v. *Emperor* (1) and by the Madras High Court in the case of *King-Emperor* v. *Gopalasamy* (2). In the latter ruling it is pointed out that there is no presumption that a distraint made for arrears of rent is legally made, and if persons are charged with having dishonestly removed property to avoid it, the prosecution must prove that it was a legal distraint. In this case the prosecution has failed to prove that there was a legal distraint. Thus, in my opinion no offence under section 424 was committed.

(1) (1909) I.L.R., 37 Cal., 122. (2) (1902) I.L.R., 25 Mad., 729.

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A second question arises in this case owing to the fact that the *shahna* immediately made over the property to the judgment-debtors for threshing, and it is at least questionable whether it can be held that once the property was made over to the judgment-debtors for threshing, it can be said to be no longer in their possession but in that of the *shahna*. If the property is in their possession they could only be charged with refusing to return it, not with removing it, and such an offence is not contemplated by section 424 of the Indian Penal Code.

I accordingly allow this revision and set aside the conviction and sentence of all the applicants and direct that the fine, if paid, shall be returned to them. They need not surrender to their bail.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Kisch

SHIAM LAL (OBJECTOR) *v.* JASWANT SINGH AND OTHERS (OPPOSITE PARTIES)*

1932
October, 12

Civil Procedure Code, order XXI, rule 90—Who can apply—"Whose interests are affected by the sale"—Not necessary that applicant must have interest in the property sold—Interest may be pecuniary.

A decree directed that two items of property were to be sold first, and if the sale proceeds were insufficient to satisfy the decretal amount, then the third item of property was to be sold. The two items of property were sold, but they fetched only a small price. A mortgagee of the third property applied under order XXI, rule 90 of the Civil Procedure Code for setting aside the sale on the ground of fraud. *Held* that the applicant was a person whose interests were affected by the sale, within the meaning of order XXI, rule 90, and so he had a *locus standi* to apply. Although he had no direct interest in the property which was sold, yet his interests would be

*First Apeal No. 194 of 1931, from an order of Ram Saran Das, Subodinate Judge of Aligarh, dated the 15th of September, 1931.

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adversely affected by the sale if it was for an unduly small price, caused by fraud.

Messrs. *S. K. Dar* and *S. N. Gupta*, for the appellant.

Messrs. *P. L. Banerji*, *Panna Lal*, *Shabd Saran* and *S. B. L. Gaur*, for the respondents.

SULAIMAN, C. J. and KISCH, J. :—This is an objector's appeal from an order refusing to set aside a sale. The application has been dismissed on the preliminary ground that the applicant has no *locus standi* to maintain it and the merits have not been gone into.

It appears that in the decree which is in execution there is a clear provision that two items of properties in Thok Net Ram and Thok Rup Singh should be sold in the first instance and that if the proceeds of these two properties prove insufficient to discharge the decree, then only the third property in Thok Ganga Ram should be sold. The appellant objector holds a mortgage over Thok Ganga Ram along with other properties. His case was that the auction sale which has taken place was fraudulent and collusive and the property which was of a high value had been sold for a small price, with the result that the decretal amount has not been discharged and his property has been ordered to be put up for sale.

The court below held that inasmuch as the property which has been sold did not belong to Shiam Lal and he had no interest in that property he has no *locus standi* to apply under order XXI, rule 90.

It seems to us that the scope of rule 90, sub-rule (1), is very wide and the words "whose interests are affected by the sale" are comprehensive enough to include the present appellant. There is no doubt that he has no direct interest in the property which has been sold, but if a fraud has been perpetrated and in collusion with the judgment-debtor and the decree-holder the property has been sold for a very small amount a

greater liability is cast on the property in Thok Ganga Ram over which the appellant holds a mortgage. His interests are therefore adversely affected by the sale and he would undoubtedly suffer by the alleged fraud or collusion. Our attention has been drawn to the case of *Bibi Mehdat-un-nissa* v. *Sheo Devi Singh* (1), which is in point. We agree with the view expressed therein and hold that the appellant is a person whose interests are affected by the sale inasmuch as his property may not be liable to be sold if without any fraud or collusion the full price is fetched by the sale of the other items, or at any rate the liability may be less than it is at present. We accordingly allow the appeal and setting aside the order of the court below send the case back to that court for disposal according to law. We direct that Shiam Lal should have his costs of this appeal from Mt. Phul Kuar the contesting respondent. The other respondents will bear their own costs. Costs incurred in the court below will abide the result.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Kisch

MANNU NAIK (APPLICANT) *v.* MATHURA PRASAD AND OTHERS (OPPOSITE PARTY) *

1932 *October*, 14

Civil Procedure Code, order XXI, rule 89—Several properties sold in separate lots to different purchasers in execution of same decree—Application for setting aside the sale of one item on deposit of its price and five per cent. thereof—Sale price of the other items not received by decree-holder at date of application—Deposit insufficient—Application not maintainable.

Several items of mortgaged properties were sold in execution of a decree on the same day, but in separate lots and to different auction purchasers. The judgment-debtor applied under order XXI, rule 89 of the Civil Procedure Code for

*First Appeal No. 193 of 1931, from an order of C. Deb Banerji, Subordinate Judge of Azamgarh, dated the 29th of August, 1931.

(1) A.I.R., 1931 Pat., 217.

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setting aside the sale of one item of property and deposited its sale price together with the penalty of five per cent. thereof. At that time the sales of the other items had not been confirmed, 30 days not having elapsed from the date of the sale, and the decree-holder had not received or even become entitled to receive the sale prices. In due course of time, however, those sales were confirmed.

Held that the application was not maintainable inasmuch as the deposit was insufficient for fulfilling the requirements of order XXI, rule 89 of the Civil Procedure Code. In order to avail himself of the provisions of that rule the judgment-debtor must bring himself strictly within its purview and must fulfil all the conditions required by it. Under that rule the whole of the decretal amount, as entered in the proclamation of sale, was to be deposited, less only such amount as might have been received since by the decree-holder; and the applicant could not claim deduction for the sale prices of the other items, as before confirmation of the sales the decree-holder could not be said to have received the amounts merely because they had been deposited to his credit.

Panna Lal v. *Bhola Nath*, I. L. R., 53 All., 152, disapproved.

Dr. *K. N. Katju* and Mr. *A. Sanyal*, for the appellants.

Mr. *K. Verma*, for the respondents.

SULAIMAN, C. J., and KISCH, J.:—This is an appeal from an order disallowing an application under order XXI, rule 89 of the Civil Procedure Code for the setting aside of a sale. It appears that in execution of a mortgage decree 12 items of properties mortgaged were sold on the same date, namely the 24th of June, 1931, in 12 separate lots and they fetched different prices, which were noted. The auction purchasers also were different. On the 21st of July, 1931, the mortgagees from the judgment-debtors of one of the items filed an application under order XXI, rule 89, for the setting aside of the sale of the item which had been sold for Rs.5,500. They deposited the sum of Rs.5,500, plus the penalty of 5 per cent. but did not deposit the whole of the decretal amount for which the properties had been put up for sale.

The learned Subordinate Judge confirmed all the sales in September, 1931. He disallowed the application of the mortgagees on the ground that it was not open to them to apply under that rule to have the sale set aside of some only of the lots.

It is contended before us in appeal that inasmuch as the sales of the other lots were confirmed and, in fact, no applications for the setting aside of those sales were ever made, it must be taken that the decree-holders had received the balance of the amount, and it was therefore open to the judgment-debtors to have the sale of this particular item set aside on payment of its price plus the penalty.

There is no doubt that when properties are sold for separate prices and in favour of different purchasers, there are so many different sales and a judgment-debtor may apply to have only one of the sales set aside. But order XXI, rule 89 prescribes that he must deposit in court a sufficient amount not only for payment to the purchaser a sum equal to 5 per cent. of the purchase money, but also for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

This rule gives an indulgence to the judgment-debtor and allows him a further period of 30 days to pay the amount together with the penalty. But in order to avail himself of the provisions of this rule he must bring himself strictly within its purview and must fulfil all the conditions required by it. It is clear that the amount which he need not deposit is the sum which has been received by the decree-holder between the date of the proclamation and the date of the deposit or, at any rate, before the expiry of 30 days from the date of the sale.

It is obvious that the sale of the other items cannot be confirmed before the expiry of the prescribed 30 days. So

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long as the sale of the other items has not been confirmed, the decree-holder has not even the right to apply to the court for the payment of the money to him. It is therefore impossible to hold that the decree-holder can be deemed to have received the amount deposited by the auction purchasers before the sale has been actually confirmed. As a matter of fact, the view taken in some of the other High Courts is that the word "received" must be taken in its literal sense and it is the actual receipt of money by the decree-holder and not the deposit of any amount by auction purchasers in court which is contemplated. But in any case it is clear that so long as the decree-holder has not the right to take the money out of court before confirmation, it cannot be said that the money has been received by him merely because it has been deposited to his credit.

In this view of the matter it seems almost impossible for a judgment-debtor to take advantage of the fact that other sales have taken place on the same date and that auction purchasers have deposited amounts, and to claim credit for those sums and deduct the same from the amount which he offers to pay. He has to pay the amount in court within 30 days whereas the confirmation of the sale of the other items cannot take place within that time. If the law were otherwise, a judgment-debtor would be able to pick and choose and apply for the setting aside of the sale of only one of the several items, which may have been sold cheap, on payment of its sale price and penalty, claiming credit for the payment of the sale price of the other items.

The learned advocate for the appellants strongly relies on the case of *Panna Lal* v. *Bhola Nath* (1). Apparently in that case also several items were sold on one and the same date and the judgment-debtor applied to have the sale of one item set aside on payment of the purchase money and penalty and claimed reduction on account of the prices paid by the auction purchasers of the other

(1) (1930) I.L.R., 53 All., 152.

items. The learned Subordinate Judge had referred to Calcutta and Madras cases, *Kripa Nath Pal* v. *Ram Laksmi Dasya* (1) and *Obla K. Subbayyan* v. *Thoppai Muthayyan* (2) which relies on an earlier Madras case, but thought that the facts of those cases were not exactly the same, and that in the absence of any authority of this Court he was entitled to take an equitable view of the matter. The learned Judges of this Court in disposing of the revision did not dissent from the view expressed in the cases quoted above and presumably considered that the case before them was distinguishable. The decision appears to have been based on a statement made on behalf of the applicant before the Bench that the decree-holder had withdrawn the money fetched at the auction sale in full satisfaction of his decree, which statement the learned advocate for the opposite party was not in a position to controvert. The learned Judges do not seem to have endorsed the view of the court below that the case could be disposed of merely on equitable grounds. The learned advocate for the respondents before us contends that it was not possible for the decree-holder to have withdrawn the money in that case before the confirmation of the sale and that the assertion must have implied that the amount was withdrawn some time before the revision came up for hearing. It seems to us that the decision is based mainly on the ground that the decree-holder had withdrawn the money and that the decree had been fully satisfied in that way. It was apparently in this view of the matter that the learned Judges thought that the amount had been received by the decree-holder.

If the learned Judges meant to lay down that the withdrawal of the money by the decree-holder after the expiry of 30 days would fulfil the requirements of the rule, we regret we are unable to agree with that view. The judgment-debtor can take advantage of the provisions of order XXI, rule 89 only if he deposits the whole

(1) (1897) 1 C.W.N., 703. (2) (1921) 42 M.L.J., 71.

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of the amount for which the property had been ordered to be sold minus what had been received by the decree-holder before the expiry of the prescribed time. We accordingly dismiss the appeal with costs.

REVISIONAL CIVIL.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Iqbal Ahmad

1932
October, 19

RAMJI MAL (PLAINTIFF) *v.* DEVI PRASAD (DEFENDANT) *

Land Revenue Act (Local Act III of 1901), sections 40, 44—Application for mutation by lessee rejected—Subsequent suit by him in revenue court for possession—Suit maintainable—Suit for declaration of title in civil court not necessary—Jurisdiction—Civil and revenue courts—Agra Tenancy Act (Local Act III of 1926), section 253—Revision—High Court can revise decree of Assistant Collector although confirmed in appeal by District Judge.

Section 40 of the Land Revenue Act means that the order of the Collector regarding the entry of names in the annual register shall be final and shall not be challenged in any subsequent proceeding, but that it would not prevent the aggrieved party from establishing his right in a civil or revenue court having jurisdiction. It follows that if a suit for establishing such right lies in a revenue court and not in a civil court, his remedy would be to approach the revenue court, which would not be bound by the previous order refusing mutation of names. Similarly section 44 merely provides that all decisions under section 40 shall be binding on all revenue courts. The binding character of the decision means that the refusal to enter his name in the annual register can no longer be challenged by any revenue court.

So, where a lessee's application for mutation was rejected on his failure to produce any evidence, and then the lessee sued his landlord for possession in the revenue court, it was *held* that the plaintiff was not challenging the correctness of the mutation order, it being admitted by him that he was out of possession; and the revenue court had jurisdiction to give him a decree for possession notwithstanding the previous order, under section 40 of the Land Revenue Act, rejecting his

*Civil Revision No. 130 of 1932.

application for mutation of names. It was not necessary for the plaintiff to go to the civil court for a declaration of title before he could maintain a suit for possession in the revenue court.

Held also, that the High Court had jurisdiction to revise the order of the Assistant Collector under section 253 of the Agra Tenancy Act when he had failed to exercise jurisdiction, even though an appeal had been preferred to the District Judge and dismissed by him.

Mr. *P. M. L. Varma*, for the applicant.

Mr. *S. N. Seth*, for the opposite party.

SULAIMAN, C. J., and IQBAL AHMAD, J. :—This is an application in revision from an order of an Assistant Collector, an appeal from which has been dismissed by the District Judge.

A preliminary objection is taken to the hearing of this revision on the ground that the remedy lay by way of revision to the Board of Revenue and not to the High Court. In our opinion this objection has no force. Under section 220 of the Agra Tenancy Act every suit brought by a thekadar against his lessor, which is of the same nature as any suit or application specified in the fourth schedule which may be brought by a tenant against his landholder, shall be deemed to be included in that schedule under the same serial number as such similar suit. Section 99 provides the remedy for a tenant who has been dispossessed. Section 212 provides a remedy for a thekadar who has been dispossessed. In the fourth schedule at serial number 12 section 99 is mentioned and an appeal is provided to the Commissioner. By virtue of the provisions of section 220 a suit under section 212 must be deemed to fall under the same serial number. But it is clear that where a question of jurisdiction has been decided in the first court and is also in issue in appeal, the appeal lies to the District Judge under section 242(3)(*b*). In the present case a question of jurisdiction was raised and decided in the first court and was raised in appeal, and in fact the

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appeal has been disposed of by the District Judge who came to the same conclusion as the learned Assistant Collector.

We are therefore of opinion that this Court has jurisdiction to revise the order of the Assistant Collector under section 253 of the Act if he has failed to exercise jurisdiction, even though an appeal has been preferred to the District Judge and dismissed by him: See *Gobardhan Das* v. *Dau Dayal* (1). The revision lies as section 252 is inapplicable to the case.

It appears that the applicant was holding a lease of a certain share in the village from the defendant previously. On the expiry of that lease his lease is said to have been renewed, but he did not obtain possession or he was dispossessed. The applicant first applied to the revenue court for the entry of his name in the annual register. A dispute was raised by the defendant as regards his possession and title, and the case went to the Sub-Divisional Officer. The present applicant failed to produce any evidence whatsoever and his application was summarily dismissed. It cannot be disputed that the order of the Collector dismissing the application for mutation of names was under section 40 of the United Provinces Land Revenue Act.

The view taken by the courts below seems to be that the order refusing to enter his name in the annual register is binding on the revenue court and therefore it is no longer open to the revenue court to give him a decree for possession of the property. The learned counsel for the respondent suggests that the proper remedy for the plaintiff may be to go to the civil court for a mere declaration,—because there he cannot get possession—and then to come back to the revenue court and sue for possession. This would obviously be a tortuous course. In our opinion the effect of section 40 and section 44 of the Land Revenue Act has not been

(1) (1930) I.L.R., 54 All., 573.

properly appreciated. Section 40(1) provides for disputes regarding entries in annual registers and says that they shall be decided on the basis of possession. Sub-section (2) provides that if in the course of inquiry into such a dispute the Collector is unable to satisfy himself as to which party is in possession, he shall ascertain, by certain summary inquiry, who is the person best entitled to the property and shall put such person in possession. Then sub-section (3) says that no order as to possession passed under this section shall debar any person from establishing his right to the property in any civil or revenue court having jurisdiction. Obviously the section means that the order of the Collector regarding the entry of names in the annual register shall be final and shall not be challenged in any subsequent proceeding, but that would not prevent the aggrieved party from establishing his right in a civil or revenue court having jurisdiction. It therefore follows that if a suit for establishing such right lies in a revenue court and not in a civil court, his remedy would be to approach the revenue court, which would not be bound by the previous order refusing mutation of names. Similarly section 44 merely provides that all decisions under section 40 shall be binding on all revenue courts. The binding character of the decision means that the refusal to enter his name in the annual register can no longer be challenged by any revenue court.

In the present case the plaintiff does not wish to challenge the correctness of the mutation order. Indeed he now accepts the position that he was not in possession and that the entry of his name was rightly refused. The relief that he now claims is that he should be given a decree for possession on the ground that he has been dispossessed by his landholder. We are clearly of opinion that a suit for recovery of possession against a landholder, when specifically provided for in the Agra Tenancy Act and to entertain which the revenue court

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alone has exclusive jurisdiction, cannot be barred merely on account of the fact that in the mutation proceedings the court refused to recognize his position as a thekadar in possession.

Section 212 of the Agra Tenancy Act gives a thekadar who has been wrongfully ejected, or wrongfully prevented from exercising any of his rights as a thekadar, the right to sue for recovery of possession. We are unable to hold that such a suit is barred.

The effect of the view of the first court that the suit is barred and that the plaintiff's remedy is only by way of some sort of a declaratory suit in a civil court amounted to a refusal to exercise jurisdiction. We accordingly allow this application and setting aside the order of the Assistant Collector send the case back to that court with directions to dispose of the same on the merits. The plaintiff applicant shall have the costs of this revision from the defendant respondent. Costs in the revenue court will abide the event.

MISCELLANEOUS CRIMINAL

Before Sir Shah Muhammad Sulaiman, Chief Justice

1932

October, 20

EMPEROR *v.* PRAGMADHO SINGH AND OTHERS*

Criminal Procedure Code, sections 366, 367, 424, 425—*Criminal appeals decided by High Court—Judgments delivered in open court but not signed by Judge—Death of Judge before signing judgments and certifying them to the court below.*

Section 424 of the Criminal Procedure Code makes the rules contained in Chapter XXVI of the Code as to the judgments of criminal courts of original jurisdiction applicable to the judgments of any appellate court other than a High Court. It is therefore clear that section 367, which provides that the written judgment should be dated and signed by the presiding officer in open court, does not apply to a High Court. There is, therefore, no provision which requires that the High Court, after pronouncing a judgment in open court, should date and sign the same. All that section 425 requires is that the judgment should be certified to the court below.

So, where certain criminal appeals were disposed of by a Judge of the High Court by the delivery of judgments in open Court, which were taken down by his judgment-writer, and in some of the cases the release warrants were signed by the Judge, but the judgments, after being faired out, remained unsigned by the Judge owing to his death, it was *held* that the omission to sign the fair copies of the judgments was in no way a serious defect, and the appeals must be deemed to have been finally disposed of, and the judgments should be certified to the court below.

SULAIMAN, C. J. :—The office has brought it to my notice that there are certain judgments in criminal cases delivered by the late Mr. Justice BANERJI in open court and taken down by his judgment-writer and which, owing to his death, remained unsigned after having been faired out. Notes were made by the Bench reader of the disposal of the cases, and in some of these the learned Judge actually signed the release warrants. It is quite clear that section 366 of the Criminal Procedure Code which requires that the judgment of every trial in any criminal court of original jurisdiction shall be pronounced in open court and section 367 which provides that the written judgment should be dated and signed by the presiding officer in open court, do not apply to a High Court. Chapter 26 applies to judgments delivered by criminal courts of original jurisdiction. Section 424 of the Act makes the rules contained in Chapter 26 as to the judgments of criminal courts of original jurisdiction applicable to judgments of any appellate court "other than a High Court." There is therefore no provision which requires that the High Court, after pronouncing a judgment in open court, should date and sign the same. As a matter of fact all that section 425 requires is that the judgment should be certified to the court below.

The criminal appeals which were disposed of by the late Mr. Justice BANERJI by the delivery of judgments in open court and which were taken down by his judgment-writer must be deemed to have been finally disposed of by

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him; the omission to initial the fair copy of the judgments is in no way a serious defect.

For the purpose of certifying the judgments to the courts below it will be convenient for them to be put up before the CHIEF JUSTICE for initialling them so that they may be certified.

MATRIMONIAL JURISDICTION

Before Mr. Justice Young

1932
October, 21

EDNA MAY HARDLESS (PETITIONER) *v.* HAROLD RICHARD HARDLESS (RESPONDENT)*

Divorce—Adultery and cruelty—Evidence—Communication of venereal disease by husband—Doctors' evidence—Privilege.

The fact that a husband has communicated venereal disease to his wife is in law sufficient evidence of adultery. It also amounts to legal cruelty.

There is no protection afforded by the Evidence Act to a doctor as such. When a doctor is called to give evidence he is in the same position as any other person not exempted by the Act. It is his duty to assist the court in every way possible and to disclose to the court all the information in his possession relevant to the matter in issue. He cannot claim privilege, on the allegation that the relationship of doctor and patient is confidential.

Messrs. *K. O. Carleton* and *O. M. Chiene*, for the petitioner.

Messrs. *Saila Nath Mukerji* and *N. C. Ganguli*, for the respondent.

YOUNG, J. :—This is the petition of Edna May Olivia Hardless against her husband, Harold Richard Hardless, of the "Sanctuary", Chunar. The petitioner by her petition claims a dissolution of the marriage on account of the cruelty and adultery of her husband. Both the parties are Anglo-Indians domiciled in India and resident within the jurisdiction of this Court. She also claims custody of the children. The parties were married in the

*Matrimonial Suit No. 1 of 1932.

month of June, 1927, when the petitioner was 16 years of age. There have been three children of the marriage, one girl and two boys, the eldest child being four years old and the youngest two years old. The petition which was originally defended is now undefended. Mr. *Saila Nath Mukerji*, counsel for the respondent, has intimated to the Court that he is unable to put his client in the box in denial of the charges.

The petitioner herself has given evidence, and she has satisfied me both as to the adultery and the cruelty. The husband, who is a handwriting expert, frequently had to be away from home in pursuance of his profession, and in the month of July, 1930, he had to go to Kurseong, stopping *en route* at Calcutta. On his return to Chunar he was ill, and it now has been proved to me beyond any possibility of doubt that he was suffering at that time from two well known venereal diseases. It is unnecessary to go into the particulars. He was treated by three doctors at different periods, all of whom have given evidence in this case. Eventually in October, 1931, it was discovered that the petitioner herself was also suffering from a venereal disease. I am satisfied that this venereal disease was given to the petitioner by the respondent. The fact that a husband has communicated venereal disease to his wife is in law sufficient evidence of adultery. It also amounts to legal cruelty. Every fact, therefore, necessary for the petitioner to prove in order to be entitled to a dissolution of marriage has been proved in this case.

An interesting point arose during the case. All the doctors claimed privilege, alleging that the relationship of doctor and patient was confidential. The law on this matter is clear. Section 126 of the Evidence Act gives protection to a barrister, attorney, pleader or vakil with regard to communications made to him in the course of his employment as such by a client. There is no protection afforded by the Evidence Act to a doctor as such. When a doctor is called to give evidence he is in the same

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position as any other person not exempted by the Act. It is his duty to assist the court in every way possible and to disclose to the court all the information in his possession relevant to the matter in issue. I, therefore, had to disallow the plea of the doctors that they were entitled to withhold their evidence in this case.

The petitioner, having proved both cruelty and adultery, is entitled to a decree *nisi* and I so pronounce. She will also have the custody of the three children, to which she is entitled. In this case as the children are of tender years, it is very important that they should be under the control of their mother. Further, the mother is living in Allahabad and facilities for schooling are more easily obtainable here than elsewhere. The husband I understand is coming to reside in Allahabad. The husband and wife have agreed that the wife should give to the husband reasonable access to his children, and I have no doubt that the petitioner will carry out her undertaking. If any dispute arises in future as to the children, I give either party liberty to apply.

[There was then an order as to costs and alimony *pendente lite*.]

REVISIONAL CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bajpai

1932
October, 24

MOTI CHAND (PLAINTIFF) *v.* BALRAM DAS (DEFENDANT)*

*Civil Procedure Code, order IX, rule 13; order XXXII, rule 11 —Minor defendant—*Ex parte *decree—Negligence and non-appearance of guardian* ad litem*—Remedy of minor—Man apply for setting aside* ex parte *decree and removal of the guardian.*

A minor defendant, against whom an *ex parte* decree has been passed owing to the default and negligence of his guardian *ad litem*, may apply through another guardian or next

*Civil Revision No. 131 of 1932.

friend for setting aside the *ex parte* decree under order IX, rule 13 of the Civil Procedure Code, and is not confined to the remedy of bringing a separate suit. The court can entertain an application on the ground of the negligence of the guardian, and can remove him and appoint another person as guardian *ad litem*.

Messrs. *P. L. Banerji* and *N. Upadhiya*, for the applicant.

Mr. *Shiva Prasad Sinha*, for the opposite party.

SULAIMAN, C. J., and BAJPAI, J. :—The court below has set aside an *ex parte* decree passed against a minor in a partition suit on the ground that the minor's father, who had previously given his consent to a deed of partition by sale in the lifetime of the grandfather, was not a fit and proper person for being appointed a guardian and that he was careless and did not appear on the date of hearing to defend the suit on behalf of the minor. In the connected application filed by the father on the ground that he was ill on the date and could not appear in court it has also set aside the decree as against him, on the main ground that in a partition suit the decree must be set aside against all the defendants. It has also removed the father from the guardianship of the minor, and appointed the minor's mother as his guardian and allowed her to file a written statement on his behalf. We do not think that it can be said in revision that either the court had no jurisdiction to pass the order that it has done, or it has acted with material irregularity in the exercise of its jurisdiction.

The learned advocate for the applicant has relied strongly on the case of *Eda Punnayya* v. *Jangala Kama Kotayya* (1) and urged before us that the only remedy open to a minor who is not properly represented is to bring a separate suit and that he cannot be allowed to be heard in the suit itself because he is not a party. We may point out that the view which has prevailed in this Court has been that a minor against whom a decree has

(1) (1919) 53 Indian Cases. 184.

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been passed without the appointment of a proper guardian has several remedies open to him; he may in that very suit, if the facts justify, appeal against the decree, apply for re-hearing under order IX, rule 13, apply for a review of judgment, or apply for an order under order XXXII, rule 5(2) of the Code, and he has, in addition, the ordinary remedy to bring a separate suit: *Bhagwan Dayal* v. *Param Sukh Das* (1).

In our opinion when a minor is made a defendant in a suit it is the minor who is a party to the suit and not his guardian *ad litem*. The guardian *ad litem's* name appears on the record in order to represent the minor, but not in his capacity as a party to the suit. A suit brought against a minor without a guardian would still be brought in time, and the appointment of a guardian *ad litem* which must be made by the court after the institution of the suit would not be barred by time merely because the guardian is appointed by the court after the expiry of the prescribed period. Although, therefore, when a decree is passed against a minor who has not been properly represented, it is open to him to treat it as if he was not a party to the suit and to avoid the decree, it does not follow that the minor who does appear in court through another guardian or next friend cannot be heard and it must be considered that he has no *locus standi* to appear except through the guardian who has been appointed by the court, however incompetent, negligent and improper he may be. It is the duty of the court to protect the interest of the minor, and we think that it is open to the court to entertain an application on the ground of the negligence of the guardian, and to remove him and appoint another if he was not a proper guardian or was negligent. The summary remedy in the suit itself is very often the least expensive. There seems to be no justification for compelling the minor to file a separate suit and incur heavy expenditure and also run the risk

(1) (1916) I.L.R., 39 All., 8 (10, 11).

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of the proceedings being prolonged, and not to allow him to avail himself of the more expeditious summary remedy open to other defendants.

In this view of the matter we think that the court below did not act without jurisdiction in entertaining the application. We accordingly see no force in this revision and we dismiss it with costs.

APPELLATE CIVIL

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Bennet

ZAMIN ALI AND ANOTHER (PLAINTIFFS) *v.* AZIZ-UN-NISSA AND OTHERS (DEFENDANTS)*

1932 *November*, 3

Muhammadan law—Dower—Widow's lien for unpaid dower —Widow "lawfully" obtaining possession—Lien not dependent on consent of heirs to the widow's taking possession—Marriage—Legitimacy—What evidence admissible where direct proof of marriage not available—Evidence Act (I of 1872), sections 2, 3, 32(5)—Practice and pleading—Suit by vendees to recover property from persons in possession—Vendors impleaded, but not raising question of consideration for the sale—Such plea not available to the defendants in possession.

All that is necessary for a Muhammadan widow to be entitled to retain possession of her husband's estate until her dower debt is paid is that she should have obtained possession peacefully and not by force or fraud. Consent of the other heirs of the deceased husband to her taking possession of the estate is not a necessary condition of her right to retain possession until satisfaction of her dower debt.

Direct proof of the performance of a marriage ceremony, or of the acknowledgment by the father of the legitimacy of the issue, is not the only evidence by which a Muhammadan marriage or legitimacy of the children can be proved. By virtue of sections 2 and 3 of the Evidence Act, any evidence permissible by the Evidence Act, e.g., under section 32(5),

*First Appeal No. 302 of 1928, from a decree of Shah Munir Alam, Subordinate Judge of Gorakhpur, dated the 27th of March, 1928.

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can be used for the purpose of considering whether the fact of marriage or legitimacy is proved, notwithstanding any rule of Muhammadan law to the contrary.

Where the vendees of a certain property sued to recover the property from the persons in possession and impleaded the vendors also as defendants, and the vendors did not challenge the sale on the ground of consideration, it was *held* that the defendants in possession had no *locus standi* to challenge the consideration of the plaintiffs' sale deed, which was a question between the vendors and the vendees.

Dr. *S. N. Sen* and Mr. *M. A. Aziz*, for the appellants.

Dr. *M. Wali-ullah* and Mr. *P. L. Banerji*, for the respondents.

MUKERJI, A. C. J., and BENNET, J. :—This is an appeal by the plaintiffs against a decree of the learned Subordinate Judge of Gorakhpur dismissing their suit for possession of certain property. [A pedigree was here set forth, which is omitted.] The plaint set forth that the property in question was owned by Saiyid Aulad Ali and that he died on the 3rd of February, 1918, leaving his widow Mt. Aziz-un-nissa, defendant No. 1, and his son Saiyid Sajjad Ali as legal heirs, entitled to 2 annas and 14 annas respectively of his estate. In the following year, on the 5th of April, 1919, Saiyid Sajjad Ali died leaving a widow, Mt. Hajra Bibi, defendant No. 2. It was stated in the plaint that Sajjad Ali entered into possession of the entire estate on the death of his father and it was not clearly specified who entered into possession on the death of Sajjad Ali. But it was stated in paragraph 8 of the plaint that defendants Nos. 1 and 2 were in possession on the date of the plaint, on the 14th of September, 1926. The claim of the plaintiffs arose through a sale deed of the 22nd of May, 1919, in favour of the plaintiffs executed by defendants Nos. 3 to 5, Saiyid Ghaffar Ali, Muhammad Anis and Muhammad Dabir Ali, sons of Mukhtar Ali (brother of Saiyid Aulad Ali) who died about the year 1897 or 1898. This sale deed was of a half share of these vendors. The suit was

contested by defendants Nos. 1 and 2 and they alleged in paragraph 12 of their written statement that defendants Nos. 3 to 5 were certainly not the sons of Mukhtar Ali, nor could they inherit the estate of Sajjad Ali. It was further alleged that a 9 anna and $7\frac{1}{5}$ pie share in mauza Chak Jalal exclusively belonged to defendant No. 1, and this particular allegation is now admitted by the plaintiffs. In paragraph 17 it was set forth that out of the remainder of the property defendants Nos. 1 and 2 were in possession of some property in lieu of dower debt, and in possession of some property by right of inheritance. If the plaintiffs have any rights, they have no right to take possession so long as they have not paid the dower debt. The learned Subordinate Judge held that the plaintiffs had failed to prove that their vendors were legitimate sons of Mukhtar Ali and he further held that in any case the defendants 1 and 2 were in possession of their husbands' properties in lieu of their dower debts. In the appeal before us these two points are in issue. It is to be noted that the defendants 1 and 2 dissented from the pleading of paragraph 12 in the written statement and a month after their written statement, on the 7th of March, 1927, their counsel made a statement that defendants 3, 4 and 5 are sons of Saiyid Mukhtar Ali by a "*madkhula*" or a kept woman. There is a great deal of difference between the original pleading that defendants 3 to 5 were not the sons of Mukhtar Ali and the amended pleading that they were his sons by a kept woman. It is particularly to be noted that defendants 1 and 2 are members of the family and they must have been very well aware of all the circumstances. When therefore they denied that defendants 3 to 5 were the sons of Mukhtar Ali at all, they were making a statement which they knew to be absolutely false. At the outset therefore their case in defence is vitiated by the false statement which they have filed in regard to the paternity of these defendants 3 to 5. We shall first review the evidence on the record as regards the parentage

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of these three defendants. It is to be noted that these defendants are men of about fifty years of age and therefore it is difficult at this late date to produce direct evidence of the marriage which they alleged took place between their mother and Mukhtar Ali somewhere about the year 1870. No evidence is forthcoming directly of the marriage, nor could we expect such evidence. A witness for the plaintiffs, Ahmad Husain, states that he heard Mukhtar saying that he had married Ghaffar's mother. * * * * There is also the evidence of Wahid Husain, who is at present the agent for defendants 3 to 5. He is a man of 55 years who is in the service of the witness Mr. Anwar Ali. Wahid Husain states: "I saw Mukhtar Ali treating Anis and Dabir and Ghaffar Ali as his legitimate sons. He got them educated, supported them, and got them treated when ill." The witness Mr. Anwar Ali is a Barrister-at-Law residing in Basti, where Mukhtar Ali was a mukhtar practising law, and his age is 53 years. He states that he knew these three defendants Nos. 3 to 5; that they were sons of Mukhtar Ali whom he knew very well and that the witness and Ghaffar Ali read together at Basti; that the father of the witness and Mukhtar Ali were friends and visited each other and that Mukhtar Ali behaved towards these defendants as his legitimate sons. [After discussing the evidence produced by both sides the judgment proceeded.] The weight of evidence certainly appears to us to be in favour of the plantiffs on this point of the legitimacy of their vendors. The argument of learned counsel for the respondents was that this evidence on the record could not be allowed under Muhammadan law to prove the point in question. The proposition laid down by the learned counsel was that to prove the legitimacy of defendants 3 to 5 there must under the Muhammadan law either be an acknowledgment by the father that the sons were legitimate or there must be proof of the marriage. He further explained that by proof of the marriage he meant evidence that the marriage ceremony had been duly

performed and he argues that the evidence on the record was not evidence which would be admissible for that purpose. We concede that there is no acknowledgment in the present case by the father that his sons were legitimate sons and therefore the plaintiffs cannot have recourse to that particular proposition of Muhammadan law. But we have not been shown any ruling to the effect that evidence of the kind on the record is not admissible for the purpose of proving the marriage of Mt. Munna with Mukhtar Ali. For example, the statement in the evidence of Ahmad Husain that he heard Mukhtar Ali saying that he had married the mother of Ghaffar is a statement made by a deceased person Mukhtar Ali to the effect that there was a marriage between him and Mt. Munna. We are of opinion that such a statement by a deceased person is admissible in evidence for the purpose in question under the provisions of section 32, sub-section (5) of the Indian Evidence Act as a statement as to marriage. We do not think that the doctrines of Muhammadan law can be held to exclude evidence of this nature and we consider that the Indian Evidence Act does apply in the present case. Section 2 of the Indian Evidence Act states : "On and from that day the following laws shall be repealed : (1) all rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India; . . ." We might further refer to the definition of "Evidence" and of "Proved" in section 3 of the Indian Evidence Act, and it is clear that evidence permitted by the Indian Evidence Act is evidence which can be used for the purpose of considering whether a fact is proved under this definition. Learned counsel took us at considerable length over a number of rulings, such as *Mt. Jariut-ool-Butool* v. *Hoseinee Begum* (1), *Ghazanfar Ali Khan* v. *Kaniz Fatima* (2), *Ma Wun Di* v. *Ma Kin* (3), *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury* (4) and

(1) (1867) 11 Moo., I.A., 194.
(2) (1910) I.L.R., 32 All., 345.
(3) (1907) I.L.R., 35 Cal., 232.
(4) (1921) I.L.R., 48 Cal., 856.

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Khaja Hidayat Oollah v. *Rai Jan Khanum* (1). Having regard to the doctrine laid down in all these rulings we consider that the fact still remains that each case must be decided on the evidence produced in that case and that what we have to consider is whether in the present case sufficient evidence has been tendered to prove that there was a marriage between Mukhtar Ali and Mt. Munna. We consider that in the present case the evidence is sufficient and we hold that defendants 3 to 5 are legitimate sons of Mukhtar Ali. The plaintiffs therefore have succeeded in our opinion in proving this portion of their case.

Issue No. 2 in this case was whether the transfer in favour of the plaintiffs was *farzi*. The lower court held that it was *farzi* on the ground that the sale consideration had not been proved. Ground of appeal No. 5 is that defendants Nos. 1 and 2 have no *locus standi* to challenge the consideration of the plaintiffs' sale deed. This doctrine of law is laid down by their Lordships of the Privy Council in *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (2). We consider that this ground of appeal is sound and we hold accordingly.

The next point which is necessary for the plaintiffs to prove is in regard to the possession of defendants 1 and 2. The plaint admits that these defendants are in possession. It is advanced in ground of appeal No. 7 that this possession is not in lieu of their dower debts. * * * * We now come to a point of law on which there is a considerable difference of legal opinion. It was advanced on behalf of the defendants 1 and 2 that they were in possession in lieu of their dower debt. It is not shown that they took possession in lieu of their dower debt, but it is shown that they are actually in possession and that the dower debt is still due to them. The difference of legal opinion has arisen on the point of whether for such a claim it is necessary or not that the consent of the heirs should be obtained when possession is taken by the

(1) (1844) 3 Moo., I.A., 295. (2) (1908) I. L. R., 35 C., 420.

widows. On the one hand it is laid down that the consent of the heirs is essential, in the following rulings : *Amanat-un-nissa* v. *Bashir-un-nissa* (1), *Muhammad Karim-Ullah Khan* v. *Amani Begam* (2), *Hamira Bibi* v. *Zubaida Bibi* (3), and *Sabur Bibi* v. *Ismail Shaikh* (4). The contrary has been held, that the consent of the heirs is not essential, in *Ramzan Ali Khan* v. *Asghari Begam* (5), *Maina Bibi* v. *Chaudhri Vakil Ahmad* (6), *Mohammad Shoaib Khan* v. *Zaib Jahan Begam* (7), and *Beeju Bee* v. *Syed Moorthiya Saheb* (8). In *Mt. Bebee Bachun* v. *Sheikh Hamid Hossein* (9) at page 384 it is remarked as follows : "It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in the case of *Ahmed Hossein* v. *Mt. Khodeja* (10). Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, *of which she has lawfully, and without force or fraud, obtained possession*, until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claim for the profits received." It is to be noted that the language used is, "of which she has lawfully and without force or fraud obtained possession". The question is whether we should read into this word "lawfully" the words "with the consent of the heirs." It is clear that a considerable extension is necessary of the word "lawfully" before it can bear such a meaning. In *Hamira Bibi* v. *Zubaida Bibi* (3) their Lordships of the Privy Council on page 588 remarked as follows :

"But the dower ranks as debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that

(1) (1894) I.L.R., 17 All., 77.
(2) (1895) I.L.R., 17 All., 93.
(3) (1916) I.L.R., 38 All., 581.
(4) (1928) I.L.R., 51 Cal., 124.
(5) (1910) I.L.R., 32 All., 563.
(6) (1924) I.L.R., 47 All., 250.
(7) (1927) I.L.R., 50 All., 423.
(8) (1919) I.L.R., 43 Mad., 214.
(9) (1871) 14 Moo., I.A., 377.
(10) (1868) 10 W.R., 369.

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if she lawfully, *with the express or implied consent of the husband, or his other heirs, obtains possession* of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussalman law which has received recognition in the British Indian courts and at this Board.

"When a widow is allowed to take possession of her husband's estate in order to satisfy her dower debt with the income thereof, it is either on the basis of some definite understanding as to the conditions on which she should hold the property, or on no understanding. If there is an agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower, she must abide by its terms. But where there is no such understanding, and a claim is made, as in the present case, the question arises whether, on equitable considerations, she should not be allowed some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal right to exact payment of her dower on the death of her husband. Their Lordships think that she is so entitled, and obviously compensation for forbearance to enforce a money payment is best calculated on the basis of an equitable rate of interest. This appears to be consistent with the chapter on "The Duties (*Adab*) of the Kazi" in the principal works on Mussalman law, which clearly shows that the rules of equity and equitable considerations commonly recognized in the Courts of Chancery in England are not foreign to the Mussalman system, but are in fact often referred to and invoked in the adjudication of cases."

In this passage it is mentioned that the consent of the heirs is necessary; but it is to be noted that this was not exactly the point which was before their Lordships, as the case was one on the point of "whether or not the widow of a Muhammadan, placed in possession of her husband's estate in lieu of her dower, was entitled when called upon by her husband's heirs to account for the rents and profits received by her during the period of her possession, to claim interest upon the amount of the dower." (See page 582). The ruling in *Maina Bibi*

v. *Chaudhri Vakil Ahmad* (1) on page 254 refers to *Mt. Bebee Bachun* v. *Hamid Hossein* (2), and their Lordships stated on page 255: "The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower debt is paid is conferred upon her by the Muhammadan law." There has been no discussion in the rulings of this Court of the meaning to be attached to the pronouncement of their Lordships: see *Hamira Bibi* v. *Zubaida Bibi* (3) and *Mohammad Shoaib Khan* v. *Zaib Jahan Begam* (4). No reference was made in this latter case to the earlier rulings of this Court, *Amanat-un-nissa* v. *Bashir-un-nissa* (5), and *Muhammad Karim-Ullah Khan* v. *Amani Begam* (6). The meaning to be attached to the pronouncement of their Lordships of the Privy Council in *Hamira Bibi* v. *Zubaida Bibi* (3) has been considered by a Full Bench of the Madras High Court in *Beeju Bee* v. *Syed Moorthiya Saheb* (7) and it was there held that their Lordships of the Privy Council did not intend to lay down the rule that consent of the heirs was essential. The contrary has been held in *Sabur Bibi* v. *Ismail Shaikh* (8) by a Bench of the Calcutta High Court. We consider that all that is necessary for the widow to retain possession until her dower debt is paid is that she should obtain possession not by force or by fraud. She is in the position of a creditor and having obtained possession lawfully, she is entitled to hold possession until her dower debt is satisfied. If she has to depend on consent of heirs, that consent she will seldom get and the rule will become nugatory. We therefore agree with the interpretation of the Full Bench of the Madras High Court expressed in *Beeju Bee* v. *Syed Moorthiya Saheb* (7).

On this view of the law we hold that the plaintiffs can only obtain a decree for possession conditional on the payment by the plaintiffs of the proportionate amount of

(1) (1924) I.L.R., 47 All., 250.
(2) (1871) 14 Moo., I.A., 377
(3) (1916) I.L.R., 38 All., 581.
(4) (1927) I.L.R., 50 All., 423.
(5) (1894) I.L.R., 17 All. 77.
(6) (1895) I.L.R., 17 All., 93.
(7) (1919) I.L.R., 43 Mad., 214.
(8) (1923) I.L.R., 51 Cal., 124.

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the share of dower due to defendants 1 and 2. That is ascertained by the following calculation. [Details of calculation and specification of properties are here omitted.] We allow a period of six months within which the plaintiffs will have to pay the proportionate amounts of dower due to defendants 1 and 2; otherwise their suit will stand dismissed with costs. If the plaintiffs pay the amounts within the period required, they will obtain proportionate costs in both courts on the amount of their success and failure. It is to be noted that the share of 9 annas $7\frac{1}{5}$ pies in mauza Chak Jalal exclusively belongs to defendant No. 1 and this will be exempted from any property decreed to the plaintiffs.

MISCELLANEOUS CIVIL

1932
November, 4

Before Mr. Justice King and Mr. Justice Iqbal Ahmad

IN THE MATTER OF A PLEADER*

Contempt of court—Committed by pleader in his personal capacity as a party—Conviction for contempt of court—Whether disciplinary action can be taken against him professionally—Legal Practitioners Act (XVIII of 1879), section 12—Bar Councils Act (XXXVIII of 1926), section 10—Misconduct.

A person, who was a pleader, committed gross contempt of court in his personal capacity as a party to a litigation, and was convicted and punished for the offence of contempt of court. *Held* that he could thereupon be dealt with, as a pleader, under section 12 of the Legal Practitioners Act.

An advocate or pleader may be punished professionally for gross contempt of court committed by him in his personal capacity. Section 10(1) of the Bar Councils Act clearly shows the intention of the legislature to render an advocate punishable in his professional capacity for misconduct other than professional misconduct.

*Miscellaneous case No. 425 of 1932.

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Sir *Tej Bahadur Sapru*, for the applicant.

Dr. *M. Wali-ullah* (Assistant Government Advocate), for the Crown.

KING and IQBAL AHMAD, JJ. :—Mr. Ram Mohan Lal, pleader, has appeared before us in response to a notice issued by a Bench of this Court to show cause why he should not be suspended or dismissed as a pleader on the ground that he has been convicted of a criminal offence which implies a defect of character which unfits him to be a pleader on the rolls of the court.

Mr. Ram Mohan Lal was the defendant in a suit pending before the Judge of the small causes court at Allahabad. He took objection to an order passed by the Judge of that court in the course of the trial of the suit and was told that if he did not agree to the court's ruling, he should take his grievance to the High Court. He then remarked: "There is no Chief Justice now." On being asked by the Judge what he meant by that remark, he said: "The Chief Justice who used to bring Judges to their senses is not here and is gone."

The matter was reported to the High Court, which took proceedings against the pleader for contempt of court. He filed a written statement giving his version of the occurrence in the small causes court, attempting to justify his conduct and making certain objectionable imputations upon the attitude taken by the Judge of that court. Subsequently, however, the learned counsel who appeared for him withdrew all the allegations contained in the first paragraph of his written statement, which served rather to aggravate the offence than to mitigate it, and admitted that the version given by the trial court was correct and made an unqualified apology. He was thereupon sentenced to pay a fine of Rs.75 for contempt of court.

A Bench of this Court then passed an order on the 27th of June, 1932, ordering him to show cause why he

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should not be dealt with as a pleader, under section 12 of the Legal Practitioners Act, in consequence of his conviction of contempt of court.

The case for the pleader has been argued by Sir *Tej Bahadur Sapru* who has admitted from the outset that this Court has jurisdiction to take action against the pleader under section 12 of the Legal Practitioners Act. It is admitted therefore that the pleader has been convicted of a criminal offence implying a defect of character which unfits him to be a pleader. His learned counsel has, however, strongly contended that in the circumstances of this case the pleader has been sufficiently punished by the sentence of fine passed upon him and that there is no need to take any further disciplinary action against him in his professional capacity. In support of this argument much reliance is placed upon *In re Wallace* (1). In that case the appellant was an advocate and also attorney admitted to practice in the Supreme Court of Nova Scotia. He was also a suitor in that court. In certain cases in which he was a suitor he supposed that he had reason to complain of the conduct of the Judges of the court and he wrote a letter of a most reprehensible character, addressed to the Chief Justice, reflecting on the Judges and on the administration of justice generally in the court. The Supreme Court took action against him for contempt of court and ordered that he should be suspended as an attorney or advocate of that court for an unspecified period. Their Lordships of the Privy Council held that as the appellant was guilty of a contempt of court committed only in his personal character, the Supreme Court should have punished the offence with the customary punishment, namely fine or imprisonment, and should not have imposed a professional punishment for an act which was not done professionally. We do not think that this ruling can be interpreted to mean that an advocate should never

(1) 1866) L.R., I.P.C., 283.

be punished professionally for contempt of court committed by him in his personal capacity, however gross the offence may be. Their Lordships held, upon the facts of that case, that there was no necessity for the Judges to go further than to award the customary punishment for contempt of court. The facts of the present case are somewhat different. The pleader in his capacity as a suitor in the trial court made a grossly improper remark reflecting upon the Judges of the High Court who at that stage had no concern whatever with the suit. There was not the slightest justification or excuse for making the scandalous attack upon the Chief Justice.

On behalf of the Crown the case, *In re Sashi Bhushan Sarbadhicary* (1), has been referred to. In that case an advocate conducting an appeal before the High Court had an altercation with one of the Judges and he subsequently published an article in a newspaper attempting to vindicate his professional conduct. This article contained libellous remarks reflecting upon certain Judges of the High Court in their judicial capacity. The High Court thereupon suspended the advocate from practice under the powers conferred by the Letters Patent. Their Lordships of the Privy Council upheld the order of the High Court, remarking that the contempt of court of which the appellant was found guilty was committed in the attempt to vindicate his professional conduct, and the publication of the libel constituted "reasonable cause" for the suspension of the advocate from practice. That case can, however, be distinguished on the ground that although the contempt of court was committed in a private capacity, it was committed with a view to vindicating the advocate's professional conduct.

Section 10, sub-section (1) of the Indian Bar Councils Act, 1926, clearly shows the intention of the legislature to render an advocate punishable in his

(1) (1906) I.L.R., 29 All., 95.

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professional capacity for misconduct other than professional misconduct. We see no good reason for holding that an advocate or pleader should never be punished professionally for contempt of court, however gross such misconduct may be, provided that the misconduct is not committed in his professional capacity. Each case should be dealt with according to the circumstances.

In the present case it is pointed out that the pleader is a young man and that he was only enrolled as a pleader in March, 1931. It is further stated before us that he had not even started practice as a pleader on the 1st of April, 1932, when he made the offensive remarks which form the basis of these proceedings. He was also in financial difficulties and was unversed in the traditions of his profession, and he merely made the offensive remarks in a moment of irritation and has now expressed his sincere regret. In these circumstances it is argued that there is no necessity to take any disciplinary action against him as a pleader when he has already been punished for contempt of court committed in his personal capacity. We have given due weight to all the extenuating circumstances which have been pointed out on his behalf but we think that it would not be expedient to impose no professional punishment whatever. His remarks about the Chief Justice were, as we have already remarked, not only scandalous but utterly uncalled for and inexcusable. If the remarks had been uttered by an ordinary suitor, they would have been highly objectionable, but when they are uttered by a suitor who is also a pleader, and who therefore should feel bound to uphold the dignity of His Majesty's judicial officers, we think that the offence should be treated more severely. As remarked by their Lordships of the Privy Council in *In re Sashi Bhusan Sarbadhicary*, "it is essential to the proper administration of justice that unwarrantable attacks should not be made with impunity upon Judges in their public capacity." In

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our opinion, the pleader's misconduct has not been adequately punished by a fine of Rs.75 only and some further professional punishment should be imposed.

Having regard to all the circumstances of the case, we order that Mr. Ram Mohan Lal be suspended from practice as a pleader for a term of six months.

APPELLATE CIVIL

Before Mr. Justice King and Mr. Justice Thom.

1932
November, 4

BHAWANI PRASAD AND OTHERS (APPLICANTS) *v.* SECRETARY OF STATE FOR INDIA AND ANOTHER (OPPOSITE PARTIES).*

U. P. Town Improvement (Appeals) Act (Local Act III of 1920), *section* 3(*a*)—*U. P. Town Improvement Act (Local Act VIII of* 1919), *section* 64(1) (*b*)—Ex parte *order by President of the Tribunal apportioning compensation—Order refusing to set aside the* ex parte *order—Not appealable.*

Under section 3(*a*) of the U. P. Town Improvement (Appeals) Act, 1920, an appeal is provided from an order deciding a question of apportionment of compensation, passed by the President of the Tribunal under section 64(1) (*b*) of the U. P. Town Improvement Act, 1919; but where such an order is passed *ex parte* and an application for setting aside the *ex parte* order is rejected, no appeal lies from the order of rejection. That order cannot be held to decide a question relating to the apportionment of compensation and cannot, therefore, come under section 3(*a*) of the U. P. Town Improvement (Appeals) Act.

Mr. *Krishna Murari Lal*, for the applicants.

Mr. *U. S. Bajpai* (Government Advocate), and Mr. *Ram Nama Prasad*, for the opposite parties.

KING and THOM, JJ.:—This is an appeal from an order passed by the President of the Tribunal under the U. P. Town Improvement Act, 1919, on the 20th of

*First Appeal No. 78 of 1931, from an order of Zahur Ahmad, President of the Tribunal of Improvement Trust, Allahabad, dated the 20th of January, 1931.

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January, 1931, rejecting an application for setting aside an *ex parte* decision.

Some land was being acquired by the Town Improvement Trust of Allahabad and the Land Acquisition Officer gave his award declaring the compensation payable to one Mohan Lal (respondent in this appeal), and to the three appellants respectively. Mohan Lal and the appellants applied for a reference to the Tribunal, both regarding the amount of compensation and regarding the apportionment thereof. On the 30th of July, 1930, the President of the Tribunal, in exercise of the powers conferred upon him under section 64(1) (*b*) of the Town Improvement Act, decided the question of the apportionment of compensation and awarded a sum of Rs.33-5-4 to the three appellants. This order was passed *ex parte* so far as the three appellants are concerned. Within a month from the 30th of July, 1930, the appellants made an application to the President for setting aside the *ex parte* decision on the ground that they had received no notice of the hearing of the case, and on the 20th of January, 1931, the President rejected the application.

A preliminary objection has been taken that no appeal lies from the order of the 20th of January, 1931.

The question whether appeals lie from awards or decisions made by the Tribunal or by the President under the Town Improvement Act is governed by a special Act entitled U. P. Town Improvement (Appeals) Act, 1920. It must be observed that under section 58(*d*) of the Town Improvement Act it is expressly provided that "the award of the Tribunal shall be deemed to be the award of the court under the Land Acquisition Act, 1894, and shall be final." The Town Improvement (Appeals) Act, 1920, modifies the Town Improvement Act, 1919, by providing for appeals to the High Court, in certain cases, from the awards of the Tribunal. Section 3 enacts that "Notwithstanding anything contained in the U. P. Town Improvement

Act, 1919, and subject to the provisions of sub-section (2), an appeal shall lie to the High Court in any of the following cases, namely (*a*) where the decision is that of the President of the Tribunal sitting alone in pursuance of clause (*b*) of section 64 of the said Act." We are not concerned with the rest of this section.

It is argued for the respondent that an appeal has been expressly provided against a decision made by the President under section 64, sub-section (1), clause (*b*), of the Town Improvement Act, and therefore an appeal lay to the High Court from the President's decision on the question of the apportionment of compensation, dated the 30th of July, 1930. No appeal against that decision was filed within limitation. It is argued for the respondent that the persons aggrieved by that decision had a remedy expressly provided for them by way of appeal to the High Court. Instead of availing themselves of this remedy they chose to make an application to the President for setting aside the *ex parte* decision. This application was rejected and there is nothing in Act III of 1920 making the order of the 20th of January, 1931, appealable. In our opinion the respondent's contention is well founded. It is clear that the intention of the legislature was to provide for appeals from the decisions of the Tribunal, or of the President thereof, only in certain specified cases and it is necessary for us to interpret the provisions of Act No. III of 1920 strictly. Under that Act an appeal did no doubt lie to the High Court from the President's decision dated the 30th of July, 1930. The question before us is whether an appeal also lies from the President's order dated the 20th of January, 1931, refusing to set aside the *ex parte* decision. In our opinion, no appeal lies against the latter order. That order cannot be held to decide a question relating to the determination of the persons to whom compensation is payable, or a question relating to the apportionment of compensation. The question decided in the order of the 20th

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of January, 1931, was simply whether a certain *ex-parte* decree should or should not be set aside, and, in our opinion, the decision of that question is not the decision of a question in pursuance of clause (*b*) of section 64 of the Town Improvement Act.

It has been strongly urged for the appellants that the word "decision" in section 3 of Act No. III of 1920 has a wide meaning. He refers also to section 2(14) of the Civil Procedure Code which shows that "decision" has a wide meaning covering both decrees and orders. We may accept the general contention that the word "decision" is a word of wide meaning, but the question before us is not merely whether the President's order dated the 20th of January, 1931, is a "decision" within the meaning of section 3 of Act No. III of 1920. The further question arises whether the order is the decision of a question *relating to the apportionment of compensation*. We are distinctly of opinion that the order in question was not the decision of a question relating to the apportionment of compensation. On this view no appeal against such an order is provided by section 3 of Act No. III of 1920.

The case of *Behary Lal Sur* v. *Nanda Lal Goswami* (1) has been referred to in support of the appellants' contention, but, in our opinion, that case has no direct bearing on the question before us. That case turned upon the interpretation of certain provisions of the Land Acquisition Act. But in the present case the question of appeals is governed by a special Act, namely Act No. III of 1920. The provisions of the Land Acquisition Act, moreover, are substantially altered by the U. P. Town Improvement Act; hence, in our opinion, the ruling referred to is inapplicable to the facts of the present case.

We hold that no appeal lies against the order in question and dismiss the appeal with costs.

(1) (1907) 11 C.W.N.. 430.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai

INDARJIT SINGH (DEFENDANT) *v.* JADDU AND OTHERS (PLAINTIFFS)* 1932 *November*, 7

Hindu law—Alienation by widow—Consent of next reversioner —Presumption of legal necessity—Nature and extent of presumption—Widow marrying second husband—Marriage of daughter born of the second marriage is not legal necessity justifying alienation of first husband's property—Estoppel—Consenting reversioner bound by the alienation.

In case of an alienation of her husband's property made by a Hindu widow with the consent of the next reversioner, such consent raises a presumption, which is rebuttable, that the alienation was justified by legal necessity. It is to be noted, however, that the only presumption in such cases is that the alienation *itself* was justified by legal necessity, and once that presumption is rebutted there is no presumption that all or any of the items of consideration for the alienation were for justifiable purposes. So, where a sale was effected by a Hindu widow, in which the next reversioner joined, for Rs.4,656, out of which Rs.2,778 was paid in cash and the balance was applied in payment of certain debts which had been incurred by the widow, and it was shown that the Rs.2,778 was not supported by any legal necessity, it was *held* that the presumption that the sale *itself* was justified by legal necessity was displaced, with the result that there was no presumption in favour of any items of the consideration being justified by legal necessity, and it was for the vendee to prove that the previous debts of the widow were supported by legal necessity; and he having failed to prove it, the plaintiffs reversioners were entitled to an unconditional declaration that the sale was not binding on them.

The next reversioner, however, who had joined in the execution of the sale deed and received a portion of the consideration, was estopped from assailing the validity of the sale and the sale was binding on him.

Where a Hindu widow married a second husband and daughters were born of the second marriage, it was *held* that the marriage of such daughters could not constitute legal necessity justifying an alienation of the first husband's property.

*First Appeal No. 208 of 1929, from a decree of Shah Munir Alam, Subordinate Judge of Gorakhpur, dated the 31st of January, 1929.

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Mr. *Haribans Sahai*, for the appellant.

Mr. *L. M. Roy*, for the respondents.

IQBAL AHMAD and BAJPAI, JJ. :—This is a defendant's appeal and arises out of a suit brought by the plaintiffs respondents for a declaration that the sale deed, dated the 4th of May, 1928, executed by Musammat Phulesra and Dhanai Sahu in favour of the defendant appellant is not binding on the plaintiffs and other reversioners of Ram Subhag deceased, after the death of Musammat Phulesra.

Ram Subhag was admittedly the last male holder of the property covered by the sale deed. Musammat Phulesra is the widow of Ram Subhag. The relationship of Dhanai and of the plaintiffs with Ram Subhag will appear from the following pedigree. [The pedigree is omitted here.]

The pedigree was admitted by the parties and a reference to the pedigree shows that Dhanai was the nearest reversioner of Ram Subhag on the date of the execution of the sale deed and that the plaintiffs were remote reversioners.

The sale deed was with respect to a four annas share in village Dharampur and the consideration for the same was a sum of Rs.4,656. Out of the sale consideration a sum of Rs.2,778 was paid in cash by the vendee, the defendant appellant, to Dhanai and Phulesra, the vendors, before the Sub-Registrar, and the balance of the sum of Rs.1,878 was left with the vendee for the liquidation or for the payment of the following debts. [Details of the debts are here omitted.]

The plaintiffs' case was that the sale deed was without consideration and without legal necessity, and that Dhanai, the nearest reversioner, was in collusion with the vendee, the defendant appellant, and he joined in the execution of the sale deed simply at the instance of the defendant appellant. The plaintiffs further alleged that

the real value of the property sold was Rs.10,000. On these allegations the plaintiffs maintained that the sale deed was not binding on them.

The defendant appellant resisted the suit on the ground that the plaintiffs being remote reversioners had no cause of action for the suit and that the sale deed dated the 4th of May, 1928, was supported by consideration and "was executed for valid and legal necessities of paying up antecedent debts which were taken from time to time for meeting valid necessities and for the marriage of a daughter". He emphasised that the fact that Dhanai the nearest reversioner of Ram Subhag had joined in the execution of the sale deed gave rise to a presumption that the sale was justified by legal necessity. He denied the allegation of the plaintiffs that the value of the property in suit was Rs.10,000, and asserted that the property was not worth more than Rs.4,656, the consideration for which it was sold.

The trial court overruled the pleas urged in defence. It held that as Dhanai, who was the nearest reversioner, had, by joining in the execution of the sale deed, precluded himself by his own act from suing, the plaintiffs, who were the remote reversioners, were entitled to maintain the suit. It further found that the sale deed was without consideration and "certainly there was no legal necessity". On these findings it decreed the plaintiffs' suit in terms of the reliefs prayed for in the plaint.

The vendee has come up in appeal to this Court and it is argued on his behalf that Dhanai, the next presumptive reversioner, having joined in the execution of the sale deed and the sale having been made with his knowledge and consent, there is a strong presumption that the sale was for legal necessity and for purposes justified by law and that the burden of proving want of legal necessity lay heavily upon the plaintiffs, which burden they failed to discharge. It is further argued that the finding of the

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court below that the sale was without consideration is not sustainable.

Before proceeding to deal with the question whether the plaintiffs have succeeded in proving that the sale itself was not justified by legal necessity, we propose to consider the correctness or otherwise of the finding of the court below that the sale deed was without consideration. If that finding stands, it is manifest that it would be unnecessary to deal with the question of legal necessity urged by the learned counsel for the defendant appellant.

[After discussing the evidence on this point the judgment proceeded.]

The plaintiff respondent gave evidence in the case but he did not deny the fact that the sale deed assailed by him was supported by consideration. He did not allege that any of the previous transactions of loan that are recited in the sale deed were not genuine transactions and were not supported by consideration. It is clear, therefore, that the evidence as regards the passing of consideration was all one way and entirely in favour of the defendant appellant, and as such we are not prepared to agree with the finding of the court below that no consideration passed under the sale deed. The promissory note with respect to which Rs.34 was left with the vendee was not proved, but the balance of the sale consideration was proved. In short the payment of Rs.4,622 by the vendee to the vendors or their creditors was proved and to that extent the sale was supported by consideration.

The next question that arises for consideration is whether the sale is binding on the plaintiffs. When an alienation made by a Hindu widow or a Hindu father or manager of a joint Hindu family is assailed by the person entitled to challenge the same, the question that arises for consideration is whether the alienation *itself* was one justified by legal necessity, and the fact that the transferee is unable to prove that a small portion of the consideration was applied for purposes of

legal necessity is no ground for setting aside the alienation; vide *Sri Krishan Das v. Nathu Ram* (1). In the case of a transfer made by a Hindu widow in possession of her husband's estate this burden can be discharged by the transferee either by proving that there was pressing necessity for the transfer or such necessity as is recognized as lawful by Hindu law, or by proving that the alienation was made by the widow with the consent of the whole body of persons constituting the next reversion. But an exception to this rule is furnished by cases in which the alienation is made by the widow not with the concurrence of the entire body of reversioners but with the consent of only the nearest reversioner. In such cases the consent of the nearest reversioner to the alienation affords presumptive proof of the fact that the alienation itself was justified by legal necessity, and, therefore, the burden initially does not lie on the transferee to show that the alienation was for legal necessity; vide *Rangasami Gounden* v. *Nachiappa Gounden* (2). The consent of the nearest reversioner to the alienation is, however, not conclusive proof of the existence of legal necessity. It merely raises a presumption of the existence of such necessity and the presumption is a rebuttable one; vide *Muhammad Sa'id Khan* v. *Kunwar Darshan Singh* (3).

As the sale assailed by the plaintiffs in the present case was made jointly by Mt. Phulesra and Dhanai Sahu, the nearest reversioner, the defendant appellant started with a presumption in his favour that the sale *itself* was justified by legal necessity, and the burden of proving the contrary lay on the plaintiffs respondents. It is to be noted, however, that the only presumption in such cases is that the alienation *itself* was justified by legal necessity, and once that presumption is rebutted there is no presumption that all or any of the items of consideration for the alienation were for justifiable purposes. The question, therefore, arises,—has that presumption that the sale was justified

(1) (1926) I.L.R., 49 All., 149. (2) (1918) I.L.R., 42 Mad., 523.
(3) (1927) I.L.R., 50 All., 75.

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by legal necessity been displaced by the evidence in and the circumstances of the present case?

A perusal of the sale deed leads to the conclusion that the immediate cause for the sale of the property was the supposed necessity to raise the sum of Rs.2,778 in cash. The other items mentioned in the sale deed were previous debts. It appears from paragraph 8 of the written statement and the statement that was made by the vendee under order X, rule 1 of the Code of Civil Procedure that the sum of Rs.2,778 was raised for the purpose of meeting the expenses of the marriage of Musammat Phulesra's daughter. The plaintiffs' case was that Ram Subhag died issueless and that after his death Musammat Phulesra married Rameshwar Teli, and that two daughters were born to her as a result of this union. The defendant appellant did not deny that Musammat Phulesra married Rameshwar Teli in *sagai* form after the death of Ram Subhag, and stated that he could not say whether the "daughter was born to Ram Subhag or to anyone else". Indeed, the plaintiffs' evidence on the point remained entirely unrebutted. The defendant appellant did not examine himself as a witness in the case, and none of his witnesses contradicted the plaintiffs' statement on this point. On the contrary, Bachoo Patak, defendant's witness, admitted that Musammat Phulesra had her *sagai* with Rameshwar Teli. Indradeo, another witness of the defendant, admitted that Musammat Phulesra has got two daughters and they are minors and unmarried. It is common ground that Ram Subhag died 24 years before the suit. It follows that the minor daughters of Musammat Phulesra could not be the daughters of Ram Subhag. It is manifest, therefore, that expenses of the marriage of those daughters could not constitute legal necessity justifying an alienation of Ram Subhag's property. Therefore the conclusion is irresistible that on the 4th of May, 1928, the date of the execution of the sale deed, there was no pressing necessity

for the sale of Ram Subhag's property. Thus the presumption with which the defendant appellant started, because of Dhanai having joined with the widow in the execution of the sale deed, was displaced. The position, therefore, is that the sale *itself* was not justified by legal necessity, and was not binding on the plaintiffs respondents, and the plaintiffs were entitled to the declaration that the sale was not binding on them and on the other reversioners except Dhanai.

The question, however, remains whether that declaration ought to be granted to the plaintiffs unconditionally. If any amount out of the sale consideration is found to be for legal necessity, the plaintiffs must, as a condition precedent to the declaratory decree prayed for, repay that amount to the vendee when they become entitled to the possession of the property after the death of the widow and Dhanai. It is manifest from the observations made above that the burden of proving the validity of the items constituting the sale consideration lay on the vendee, the defendant appellant. We have already held that the sum of Rs.2,778 was not for legal necessity. The other debts that were sought to be liquidated by the execution of the sale deed in dispute and which are mentioned in the said deed were debts incurred by Musammat Phulesra alone or in conjunction with Dhanai. Neither of those debts were incurred by Ram Subhag, the last male holder. There is no evidence on the record to show that the income of the property left by Ram Subhag was not sufficient for the justifiable needs and for the maintenance of Musammat Phulesra. The recital in the mortgage deed that the amounts advanced by the respective mortgagees were required for payment of Government revenue or for the purchase of bullocks was no evidence against the plaintiffs respondents. Neither Musammat Phulesra nor Dhanai nor the defendant appellant gave evidence in the case. In short, there was no evidence to prove that any of the items constituting the sale consideration was for legal

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necessity. The plaintiffs were, therefore, entitled to the unconditional decree granted to them by the court below.

The decree of the lower appellate court, however, requires modification in one respect. The lower appellate court has decreed that the sale deed is not binding on the plaintiffs and other reversioners of Ram Subhag deceased. Dhanai is undoubtedly bound by the sale. He joined in the execution of the sale deed and received a portion of the consideration of the same. He, therefore, is estopped from assailing the validity of the sale deed. The decree of the lower appellate court will, therefore, be modified by the addition of the words "except Dhanai Sahu" after the words "other reversioners of Ram Subhag deceased". In other respects the appeal fails and is dismissed with costs.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Bennet

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KISHWAR JAHAN BEGAM (DEFENDANT) *v.* ZAFAR MUHAMMAD KHAN (PLAINTIFF)*

Interest—Beneficiary under a deed of waqf entitled to interest against a mutwalli—Equitable jurisdiction to allow interest—Trusts Act (II of 1882), *section* 23(b).

Where a mutwalli unreasonably delays the making of payment to a beneficiary under a deed of waqf, the beneficiary is entitled to receive interest from the mutwalli on equitable grounds.

Where a case, in England, would fall within the common law jurisdiction, no equitable principles are to be applied in awarding or withholding interest; but where a case would fall within the equitable jurisdiction exercised by the Court of Chancery, equitable considerations might induce the court to allow interest. A suit by a beneficiary, entitled under a deed of waqf to a certain share in the profits of a zamindari property, against the mutwalli for accounts and recovery of the profits due would fall under the latter class and interest could be allowed on equitable grounds.

*First Appeal No. 221 of 1929, from a decree of S. Iftikhar Husain, Subordinate Judge of Pilibhit, dated the 22nd of December, 1928.

The position of a mutwalli, *qua* his duty to make certain payments enjoined by the deed of waqf, was that of a *quasi* trustee, and section 23 of the Indian Trusts Act would be a proper guide in deciding whether there were equitable grounds for allowing interest in this case, although the case did not fall within the Trusts Act.

Dr. *K. N. Katju* and Mr. *S. Muhammad Husain*, for the appellant.

Dr. *S. N. Sen* and Mr. *Mukhtar Ahmad*, for the respondent.

MUKERJI, A. C. J., and BENNET, J. :—This is an appeal by the defendant in the suit and she raises two questions, one of construction of a document and the other of law.

There is a pedigree appended to the plaint which explains the relationship that exists between the parties. It appears that Musammat Bismilla Begam, the mother of the defendant, executed, among other documents, a deed of waqf by which she sought to confer certain benefits in certain properties on Akhtar Jahan Begam and, after her, on some other persons. We have to decide whether the plaintiff respondent is one of those other persons to benefit under the deed of waqf. The document is dated the 24th of September, 1926. It has not been translated and printed, but the original document has been read out to us and we are of opinion that the court below was right in its construction of the document. The document says at two places that on the death of Akhtar Jahan Begam her heirs according to the Muhammadan law would be entitled to the profits (from the property) which were being enjoyed by Akhtar Jahan Begam. The learned counsel for the appellant has argued that Bismilla Begam really meant to say that the lineal descendants of Akhtar Jahan Begam would alone enjoy the profits and not any other heir under the Muhammadan law. The plaintiff is the husband of Akhtar Jahan Begam and is

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not, therefore, a lineal descendant of Akhtar Jahan Begam, though he is one of her legal heirs.

Some evidence was admitted by the court below which was meant to explain what was in the mind of Musammat Bismilla Begam. This oral evidence, in our opinion, was inadmissible, having regard to the provisions of section 91 of the Indian Evidence Act. Musammat Bismilla Begam lived for several years after the execution of the deed of waqf and she never sought to rectify it on the ground that her intentions were not fully expressed by the document. As we have said, we hold with the court below that the plaintiff respondent is entitled to a share in the profits which were earmarked for Akhtar Jahan Begam.

The second point is whether the respondent has been properly allowed interest on his claim by the court below. The question of interest is not entirely free from difficulty. The learned Subordinate Judge held that the appellant was in the position of a lambardar, and as interest was allowed against a lambardar by the Tenancy Act, on principle, he, the learned Judge, was entitled to award interest against the defendant.

A number of rulings have been cited before us and we may refer to some of them. In *Jwala Prasad* v. *Hoti Lal* (1) a Bench of this Court held that interest could be awarded only as a matter of law, and in the case of a contract as damages. What the Bench laid down was that there was no arbitrary rule for awarding interest. The correctness of this case was doubted in a later case, *Anrudh Kumar* v. *Lachmi Chand* (2), but the decision in that case was based on a *quasi* contract and the principle of law enunciated under section 73 of the Contract Act applied.

In *Kalyan Das* v. *Maqbul Ahmad* (3), their Lordships of the Privy Council are reported to have stated,

(1) (1924) I.L.R., 46 All. 625. (2) (1928) I.L.R., 50 All., 818.
(3) (1918) I.L.R., 40 All., 497.

at the top of page 504, that "interest depends on contract, express or implied, or on some rule of law allowing it. Here there is no express contract for interest and none can be implied, and no circumstances less capable of justifying the allowance of interest as a matter of law can be imagined." In *Hamira Bibi* v. *Zubaida Bibi* (1) their Lordships of the Privy Council allowed to a Muhammadan lady, who was in possession of her husband's estate in lieu of dower, a certain amount of interest by way of compensation to her, as she had to manage the property and render an account, and had refrained from enforcing her right of dower against the estate. Their Lordships there said that they were allowing interest on "equitable grounds".

In a much later case, *Maine and New Brunswick Electrical Power Co.* v. *Alice M. Hart* (2), disallowing interest which had been allowed by the lower court, their Lordships of the Privy Council are reported to have stated at page 1069 as follows: "It remains to consider whether any rule of equity entitles the plaintiff to interest." Their Lordships before making this statement had examined the language of a certain statute somewhat similar to our Interest Act, and had come to the conclusion that no interest could be allowed under that rule of law. Then their Lordships further stated: "In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as for example, the non-performance of a contract of which equity can give specific performance." Then their Lordships proceeded to examine whether the case before them was one in which interest could be awarded as a matter of equity and their Lordships remarked that the suit was based on a covenant which was contained in a contract which had been fully

1) (1916) I.L.R., 38 All., 581. (2) [1929] A.L.J., 1065.

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executed and there was no room for exercise of equitable jurisdiction.

From these cases, the rule laid down by their Lordships seems to be this: Where a case, in England, would fall within the common law jurisdiction, no equitable principles are to be applied in awarding or withholding interest; but where a case fell within the equitable jurisdiction exercised by the Court of Chancery, equitable considerations might induce the court to allow interest. In the case of *Maine and New Brunswick Electrical Power Co.* v. *Alice M. Hart* (1) there was no jurisdiction of the equity court and, therefore, it was held that no interest could be allowed.

If this principle be correct, we are of opinion that interest would be allowed in this case if it were tried in England. It is true that their Lordships of the Privy Council have held, in *Muhammad Rustam Ali Khan* v. *Mushtaq Husain* (2), that the mutwalli was not a "trustee" and therefore had no interest in the property which he managed and therefore the deed of trust was not required by the law of registration to be registered. But so far as the position of a mutwalli as the manager of the estate goes and so far as it is his duty to make certain payments enjoined by the deed of waqf, he, in our opinion, stands in the position of a *quasi* trustee. He may not have any personal interest in the property, but he has to discharge all the obligations which would ordinarily fall upon a trustee. A suit for accounts in England would lie in the Court of Chancery, and that was the reason why in *Hamira Bibi's* case (3) their Lordships applied "equitable considerations" and awarded interest. If then the case before us would fall within the equity jurisdiction of the court in England, interest would be allowed on equitable considerations. Here, in India, section 23 of the Indian Trusts Act would be our guide in deciding

(1) [1923[A.L.J., 1065. (2) (1920) I.L.R., 42 All., 609.
(3) (1916) I.L.R., 38 All., 581.

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whether, on equitable considerations, interest may be allowed to the respondent or not. Section 23 of the Trusts Act lays down that "A trustee committing a breach of trust is not liable to pay interest except in the following cases: . . . (*b*) where the breach consists in unreasonable delay in paying trust money to the beneficiary."

We think that taking section 23(*b*) as our guide, we are entitled to hold that interest was properly allowed against the appellant by the court below. We are not forgetful of the fact that the case does not fall within the Trusts Act. We have tried to find out, with the aid of that Act, whether we are entitled to award interest on what has been termed by their Lordships of the Privy Council as "equitable grounds".

The result is that the appeal fails and is hereby dismissed with costs.

REVISIONAL CIVIL

Before Mr. Justice Kendall

DILSUKH RAI BAIJNATH AND ANOTHER (DEFENDANTS) v. DWARKA DAS (PLAINTIFF)*

1932 *November*, 8

Civil Procedure Code, order VI, rule 17—Amendment of plaint—Order granting amendment—Revision—"Case decided"—Civil Procedure Code, sections 115, 151—Abuse of process of the court.

The plaintiff sued to recover a specified sum alleged to be due from the defendant as the result of three transactions in which the defendant was his commission agent. After the whole of the evidence in the suit had been recorded the plaintiff applied to amend the plaint so as to convert the suit into one for rendition of accounts. Against the order granting the application the defendant filed a revision. *Held* that the order allowing the plaint to be amended could not be deemed to be a "case decided" within the meaning of section 115 of the Civil Procedure Code and no revision lay.

*Civil Revision No. 638 of 1931.

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Held also, that there was no abuse of the process of the court calling for interference under section 151 of the Code.

Mr. *Panna Lal*, for the applicants.

Mr. *S. N. Gupta*, for the opposite party.

KENDALL, J. :—This application has been made for the revision of an order of the Munsif of Hathras permitting the plaintiff opposite party to amend his plaint. As originally filed, the plaint was one for a specified sum of money on the ground that as the result of three transactions between the plaintiff and the defendant, who was his commission agent, that sum was due to the plaintiff. After all the evidence had been recorded, and on account of some admissions made by the defendant in the course of his examination, the plaintiff made an application to amend the plaint so as to make the suit one for rendition of accounts. The present application is made on the grounds that the court acted irregularly in allowing the plaint to be amended after the case had been closed by the parties and was ripe for decision, and also because the proposed amendment has the effect of changing the nature of the suit.

A preliminary objection has been made on the ground that as the case has not been decided, no application under section 115 of the Civil Procedure Code can be entertained. This objection is based on the Full Bench decision in the case of *Buddhu Lal* v. *Mewa Ram* (1). It is admitted that there has been a difference of opinion among the different High Courts in India, but it is claimed that so far as this Court is concerned the decision of the Full Bench clearly shows that no revision will lie in circumstances such as these. There is no doubt that even in this Court there has not been complete harmony in defining the limitations of section 115, or to be more precise, that there have been some conflicting decisions as to the definition of the words "case decided" which are used in section 115.

(1) (1921) I.L.R., 43 All., 564.

For instance, in the Full Bench decision to which I have alluded, three of the learned Judges held that the decision of an issue relating to the jurisdiction of the court "could not properly be described as a case decided", whereas the other two were of a contrary opinion. I have also been referred on behalf of the applicant to the cases of *Radha Mohan Datt* v. *Abbas Ali Biswas* (1) and *Puran Lal* v. *Rup Chand* (2). In the former of these cases the Bench decided that where an order setting aside a decree has been passed by a court in defiance of the provisions of order IX, rule 13, of the Civil Procedure Code the matter is a "case decided" and the High Court is entitled to interfere in revision. In the latter case the High Court intervened when the lower court had appointed an arbitrator whom it had no power to appoint, holding that the appointment amounted to a "case decided". I think that the case of *Radha Mohan Datt* v. *Abbas Ali Biswas* is clearly distinguishable from the present one. An application for an order setting aside a decree initiates a proceeding which involves the recording of evidence and the decision of an issue which is, however, quite distinct from the issues in the suit proper. It is in fact of the nature of a complete case ancillary to the main suit, but quite distinct from it in giving rise to considerations which have nothing whatever to do with those which govern the parent suit. The case of *Puran Lal* v. *Rup Chand* (2) is more helpful to the applicant, but here the court was largely influenced by the consideration that unless the proceedings relating to the appointment of an arbitrator were held to amount to a "case decided" there might have been some unnecessary proceedings in which a large number of witnesses might be examined. On the other hand the case of *Risal Singh* v. *Faqira Singh* (3) shows that an order setting aside an arbitration award does not

(1) (1931) I.L.R., 53 All., 612. (2) (1931) I.L.R., 53 All., 778.
(3) (1931) I.L.R., 53 All., 1006.

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amount to a "case decided", and no revision will lie from such an order. I have only quoted some recent decisions of this Court, as it would be tedious to refer to all the instances which have been adduced as "cases decided" for the purposes of revision. The court has sometimes taken a narrower and sometimes a broader view of the meaning of the expression "case decided", but it has never, I believe, interpreted section 115 so widely as to permit the decision of one issue out of several, or the propriety of an interlocutory order of a routine nature, to form the basis of an order in revision. In the present case the order allowing the plaint to be amended cannot, in my opinion, be interpreted by any stretch of language as a "case decided".

Mr. *Panna Lal* has suggested that even if section 115 be held not to be strictly applicable, an order ought to be passed under section 151 to prevent abuse of the process of the court. If I were satisfied that in the present case there had been an abuse of the process of the court I should agree with him. The learned Munsif, however, has not passed his order without applying his mind to the case, and he has come to the conclusion that the proposed amendment will not change the nature of the suit. No doubt the ultimate decision of the Munsif will be the subject of an appeal, and I do not wish to express a definite opinion as to whether it does or does not change the nature of the suit. The question is at any rate one which is open to argument, and I am not satisfied that any order is necessary in the ends of justice or to prevent abuse of the process of the court. The result is that the application fails and is dismissed with costs.

APPELLATE CIVIL

Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai

AMBIKA PRASAD UPADHIYA (PLAINTIFF) *v.* SADA SHEO LAL (DEFENDANT) * 1932 *November, 9.*

Adverse possession—Co-tenants—Auction purchaser of share of one co-tenant—Formal possession and mutation of names obtained by auction purchaser but not actual possession—Suit for possession against the other co-tenant—Limitation—Ouster—Jus tertii.

S. S. and *S. L.* were the co-tenants of a fixed rate holding. The share of *S. L.* was sold in execution of a decree and formal possession was delivered to the auction purchaser in 1907. Failing to obtain actual possession, the auction purchaser sued *S. S.* for partition and possession in 1914; partition was refused and joint possession was decreed, and in execution again a formal delivery of possession was obtained, in 1915. A transferee from the auction purchaser got mutation of names effected in his favour in 1918. In the aforesaid proceedings *S. S.* throughout resisted and denied the title of the auction purchaser as well as his successor in title; and neither of them ever obtained actual possession. In 1828 the transferee brought a suit against *S. S.* for joint possession and mesne profits. The defendant pleaded that he and *S. L.* and *S. L.'s* sons had all along been in possession and that the suit was barred by adverse possession for over 12 years. *Held* that the suit was barred by limitation, time having begun to run from the delivery of formal possession in 1915.

Ordinarily the possession of one co-owner is in the eye of the law the possession of the others, and in order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster and the possession subsequent to that must be for the statutory period. In the present case there had been throughout an open denial of title and resistance to possession. So there had been an ouster, and the possession was adverse.

On the contention that the defendant's plea that he and *S. L.* were jointly in possession showed that he did not claim title in himself *qua S. L.'s* share and the setting up of *jus*

* Second Appeal No. 255 of 1930, from a decree of V. Mehta, Additional Subordinate Judge of Benares, dated the 3rd of December, 1929, reversing a decree of Bind Basni Prasad, Munsif of Havali, dated the 28th of February, 1929.

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tertii did not amount to adverse possession, it was *held* that the admission about the possession of *S. L.* could be of no avail to the plaintiff, as the possession of *S. L.* could not be deemed in law to be the possession of the plaintiff or his predecessor in title and was, in fact, adverse throughout.

Messrs. *P. L. Banerji* and *N. Upadhiya*, for the appellant.

Mr. *A. Sanyal*, for the respondent.

IQBAL AHMAD and BAJPAI, JJ. :—This is an appeal by an unsuccessful plaintiff whose claim for joint possession along with the defendant respondent over certain fixed rate tenancy plots and for the recovery of Rs.270 as mesne profits has been dismissed by the lower appellate court on the ground that the claim was barred by limitation.

The plots in dispute admittedly belonged to Sada Sheo Lal, the defendant respondent, and his cousin Shankar Lal. His Highness the Maharaja of Benares held a simple money decree against Shankar Lal, and in execution of the same the rights and interests of Shankar Lal in the plots were attached and sold and purchased by the Maharaja on the 21st of August, 1905, and he obtained formal delivery of possession on the 19th of February, 1907. The Maharaja, however, could not obtain actual possession of the plots and he filed a suit in 1914 against Sada Sheo Lal and his sons for partition and for separate possession of his share. The suit was contested by Sada Sheo Lal. The prayer for partition was refused, but the claim of the Maharaja for joint possession was decreed, and in execution of the decree the Maharaja obtained formal delivery of possession on the 1st of September, 1915. On the 15th of August, 1916, the Maharaja sold his rights and interests in the plots to the father of the plaintiff appellant, and he applied for mutation of his name in the revenue papers. The application for mutation of names was also resisted by the defendant respondent and other members of his family. Their objections, however, were overruled and mutation was ordered in

favour of the father of the plaintiff appellant on the 6th of November, 1918. It is clear from the facts stated above that the rights and interests of Shankar Lal in the plots in dispute passed to the father of the plaintiff appellant.

The suit giving rise to the present appeal was brought by the plaintiff appellant on the allegation that after the sale deed dated the 15th of August, 1916, his father remained in possession of the plots in dispute jointly with Sada Sheo Lal, the defendant respondent, and after his father's death in December, 1919, the plaintiff also remained in joint possession of the plots but subsequently was dispossessed by the defendant respondent. It was stated in the plaint that the cause of action for the suit arose in the month of December, 1919, when the plaintiff was wrongfully dispossessed by the defendant respondent.

The defendant respondent denied the allegations of the plaintiff as regards the plaintiff or his father being in possession of the plots in dispute and alleged that all through he and Shankar Lal and Shankar Lal's sons remained in possession of the same, and that neither the Maharaja nor the father of the plaintiff ever succeeded in obtaining possession of the plots. He contended that the suit was barred by 12 years' rule of limitation.

The trial court, after pointing out that the attempts of the Maharaja to attach and sell the share of Shankar Lal and to get possession of the same were always opposed by the defendant respondent and the members of his family and so was the attempt of the father of the plaintiff appellant to obtain mutation of names in his favour, held that though the objections of the defendant and the members of his family were never crowned with success in courts of law, the actual possession of the plots always remained with the defendant and that neither the plaintiff nor his father nor the Maharaja was ever able to obtain joint possession over the plots in dispute. It was of the opinion that fresh start to the period of limitation

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was given by the proceedings for delivery of formal possession dated the 1st of September, 1915, and that though the suit was brought more than 12 years after that date it was not time-barred as "Mere exclusive possession by one co-owner does not amount as the ouster of others and constitute that possession as adverse against other co-owners. There must be a clear and unambiguous repudiation of title of other co-owners by the co-owner in possession", and that in the present case the defendant appellant had failed to prove such repudiation of the title of the plaintiff or of his father or of the Maharaja. It held that as the defendant alleged that he was all along in possession jointly with Shankar Lal and his sons he cannot be said to have set up title in himself *qua* the share of Shankar Lal and that "setting up of *jus tertii* does not amount to adverse possession". In short, it was of the opinion that as the defendant did not claim title in himself *qua* Shankar Lal's share, he could not be said to have acquired title by adverse possession to the same, and in this view overruled the plea of limitation raised by the defendant and passed a decree in the plaintiff's favour.

The lower appellate court agreed with the trial court in holding that neither the plaintiff appellant nor his father nor the Maharaja of Benares were ever in actual possession of the plots in dispute, but held on the authority of the decision in *Sita Ram Dube* v. *Ram Sundar Prasad* (1) that the suit was time-barred.

In second appeal before us the accuracy of the decision of the lower appellate court on the question of limitation is called into question and it is argued that as it was the defendant's case that he was never in sole possession of the plots in dispute, and that Shankar Lal and his sons also remained in joint possession with him, the defendant's possession could not be adverse as regards the share of Shankar Lal and his sons, and, as such, the

(1) (1928) I.L.R., 50 All., 813.

plaintiff was entitled to a decree. It is further pointed out that the case was between co-tenants and that the possession of one co-tenant is in law the possession of the other and that nothing short of ouster or something equivalent to ouster could put an end to that possession. With this contention we are unable to agree.

It is well established that each joint owner has the right to the possession of all the property held in common, and that he has the same right to the use and enjoyment of the common property as he has to his sole property except in so far as it is limited by the equal right of his co-sharers. Accordingly, each co-owner is entitled to enjoy every part of the common property, but his possession is in the eyes of law the possession of all the co-owners and, unless he openly denies the title of his other co-owner and such denial is accompanied by dispossession of the other co-owner, time does not begin to run against the latter. In other words, in order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster, and the possession subsequent to that must be for the statutory period; *vide Ahmad Raza Khan* v. *Ram Lal* (1) and *Gobinda Chandra Bhattacharjee* v. *Upendra Chandra Bhattacharjee* (2). But it appears to us that these propositions have no application to the facts of the present case. In the present case if the controversy had been between Sada Sheo Lal, the defendant respondent, and Shankar Lal's sons it might have been impossible for Sada Sheo Lal to successfully put forward the plea of adverse possession, but in our judgment the plea of limitation raised by Sada Sheo Lal against the claim of the plaintiff appellant was unanswerable and was rightly given effect to by the lower appellate court.

By his auction purchase of the year 1905 His Highness the Maharaja of Benares became a co-tenant with Sada Sheo Lal, but his attempt to obtain actual possession

(1) (1914) I.L.R., 37 All., 203. (2) (1919) I.L.R., 47 Cal., 274.

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of the plots in dispute always failed. Throughout, Sada Sheo Lal denied his title to the plots. The title of the father of the plaintiff appellant was also denied by Sada Sheo Lal and the members of his family in the course of the mutation proceedings consequent on the execution of the sale deed by the Maharaja in favour of the father of the plaintiff. It is clear, therefore, that there has all along been an open denial by Sada Sheo Lal of the title of the plaintiff and of his predecessors in title. It is further clear from the finding recorded by the lower appellate court, which finding is binding on us in second appeal, that neither the plaintiff nor his predecessors in title ever succeeded in obtaining actual possession of the plots. It follows, therefore, that there has been an ouster of the plaintiff and of his predecessors in title from the year 1905. It is not easy to frame a formula to cover all cases of ouster, but it may generally be stated that where there is an actual turning out or keeping excluded the party entitled to the possession there is an ouster. The resistance on the part of Sada Sheo Lal and the members of his family had the effect of preventing the plaintiff's predecessors in title from obtaining actual possession and this, coupled as it was by an open denial of their title, amounted in our judgment to their ouster. Therefore time began to run against the Maharaja of Benares from the 1st of September, 1915, the date on which he obtained formal delivery of possession in execution of the decree obtained by him for joint possession over the plots in dispute. This was the view taken by this Court in *Sita Ram Dube* v. *Ram Sundar Prasad* (1), and in view of that decision we must hold that the present suit was time-barred.

We are unable to agree with the trial court in holding that in the present case the fact of Sada Sheo Lal's "setting up of *jus tertii* does not amount to adverse possession". It is, no doubt, a fact that Sada Sheo Lal admitted that Shankar Lal and his sons have also been in joint

(1) (1928) I. L.R., 50 All., 813.

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possession with him of the plots in dispute, but the possession of Shankar Lal and his sons cannot be deemed in law to be the possession of the plaintiff or of his predecessors in title. The admission of Sada Sheo Lal about the possession of Shankar Lal's sons can therefore be of no avail to the plaintiff. Shankar Lal, as already stated, was the judgment-debtor in the decree held by the Maharaja. Notwithstanding the sale of his share he and his sons continued in possession of the plots. Their possession was adverse to that of the Maharaja and of his successors in title, and it would be absurd to give to the Maharaja or to his successors in title including the plaintiff the benefit of possession on the part of Shankar Lal and his sons, which was adverse to them from the very outset. If the plaintiff had impleaded Shankar Lal's sons in the present suit and if the latter had pleaded adverse possession there could have been no answer to that plea, and it is impossible to appreciate how by omitting to implead Shankar Lal's sons the plaintiff can insist on the possession of Shankar Lal's sons being deemed to be equivalent to his own possession.

For the reasons given above we hold that the suit was time-barred and we dismiss this appeal with costs.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Rachhpal Singh

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MUHAMMAD SHAFIQ AHMAD AND ANOTHER (JUDGMENT-DEBTORS) *v.* RAM KATORI AND ANOTHER (DECREE-HOLDERS) *

Civil Procedure Code, order XXXVIII, rule 5—Attachment before judgment—Suit for sale on mortgage—Application for attachment made after the preliminary decree for sale but before the final decree—Application maintainable.

The language of order XXXVIII, rule 5 of the Civil Procedure Code is very wide and an application for attachment

* First Appeal No. 176 of 1931, from an order of Pran Nath Agha, Additional Subordinate Judge of Moradabad, dated the 15th of September, 1931.

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before judgment can be made by a mortgagee decree-holder after the passing of the preliminary decree for sale and before the final decree, on the ground that the mortgaged property has much depreciated in value and that the defendant mortgagor is about to dispose of or remove his other property, so as to defeat the decree under order XXXIV, rule 6, which may ultimately be passed in the suit.

Mr. *Panna Lal*, for the appellants.

Mr. *Vishwa Mitra*, for the respondent.

MUKERJI, A. C. J., and RACHHPAL SINGH, J. :—This is an appeal against an order directing the attachment before judgment of certain properties of the defendants who are the appellants before us.

It appears that the respondents obtained a preliminary decree for sale against the appellants on the 24th of February, 1931. After the expiry of the usual six months' time allowed for payment, on the 27th of August, 1931, the respondents made an application for the passing of the final decree. Ten days later, on the 7th of September, 1931, the plaintiffs applied for attachment before judgment of the property of the defendants. An affidavit was filed along with the application. The application was based on the ground that the property mortgaged had deteriorated in value and was likely to deteriorate in value further owing to the remission of rents on the part of the Government. The application further stated that it was feared that the defendants who had already encumbered some of their properties would dispose of or encumber their remaining property in order to avoid the payment of the decretal amount that would remain unpaid and unsatisfied even after the sale of the mortgaged property. The defendants contested this application but the learned Judge passed a two-line order to the following effect: "Let a temporary attachment go, but property fetching an annual profit of Rs.800 and no more will be attached." It was a very vague order to pass, but we are told by the learned counsel for the respondents that it has been rectified by the court

on obtaining a list of the properties, together with a statement of the land revenue paid by them. Ultimately only such properties have been attached which pay a total revenue of Rs.800 a year.

The learned counsel for the appellants has put forward two arguments before us. One is that at the stage at which the application for attachment before judgment was made no application was maintainable in law; and the second is that on the merits this was not a case in which an order for attachment before judgment could be made.

On the first point we are of opinion that the contention is not sound. The language of order XXXVIII, rule 5, is very wide and does embrace a case like this. In this very case, supposing the facts alleged are true, and in similar cases, it can certainly not be open to the judgment-debtor to sell off his entire property in order that he might defeat the decree for money that may be passed against him under order XXXIV, rule 6 of the Civil Procedure Code. The learned counsel has cited before us the case of *Muhammad Inamullah Khan* v. *Narain Das* (1). That case was decided on its own facts and their Lordships clearly state the reasons why they thought that order XXXVIII, rule 5, had no application. They state: "There is no suggestion that the appellant is about to dispose of the whole or any part of his property, or remove it from the jurisdiction of the court . . ." This case, therefore, is no authority for the proposition that at the stage already described an application like the one made by the respondents could not be entertained.

On the merits we find that the application was based on an affidavit filed by one Dal Chand. In paragraph 4 Dal Chand says: "I solemnly affirm and state that this is quite *possible* that the judgment-debtors would transfer their remaining *khalis* property to some other persons so that the petitioners may not be able to realise

(1) (1915) I.L.R., 37 All., 423.

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the remaining amount of decree and that they may be put to considerable loss." This certainly is not a ground described in order XXXVIII, rule 5, and no order of attachment before judgment could be based on such a state of facts.

On behalf of the respondents we have been told that the order passed by the learned Judge was in the nature of an *ad interim* order made with a view to securing the property before further investigation could be made in the case. The learned counsel for the parties are agreed that the order appealed against may be allowed to stand for the present but the case may be sent back to the court below for an investigation into the application, on proper evidence. We accept this suggestion on the part of counsel and send the case back with the direction that the learned Judge would take up the application of the 7th of September, 1931, and adjudicate on it after giving the parties an opportunity to adduce such evidence, by way of affidavit or otherwise, as they may be advised to produce. We direct accordingly.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Rachhpal Singh

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RAJENDRA BEHARI LAL (JUDGMENT-DEBTOR) *v.* GULZARI LAL AND OTHERS (DECREE-HOLDERS)*

Civil Procedure Code, order XXI, rules 54, 67 *and* 90—*Application for setting aside execution sale—Sale not proclaimed by beat of drum—Material irregularity.*

The law requires that an impending execution sale should be proclaimed by beat of drum or other customary mode, and failure to do so is a material irregularity. The addition of the words, "so far as may be", in order XXI, rule 67 of the Civil Procedure Code, 1908, does not make any change in the law in this respect in cases where it is possible to have a sale proclaimed by beat of drum.

Mr. *Gopi Nath Kunzru*, for the appellant.

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* First Appeal No. 47 of 1932, from an order of Ram Saran Das, Subordinate Judge of Aligarh, dated the 16th of February, 1932.

Dr. *S. N. Sen*, Messrs. *P. L. Banerji*, *S. B. Johari*, *Kamta Prasad*, *Chandarbhan* and *Janki Prasad Saigal*, for the respondents.

MUKERJI, A. C. J., and RACHHPAL SINGH, J. :—This is an appeal from an order refusing to set aside an auction sale held on the 20th of August, 1931.

It appears that a mortgage decree was made on the 28th of May, 1929, against a minor, Rajendra Behari Lal, who is the appellant before us, in favour of the respondents, Gulzari Lal and others. Fifteen biswas of village Hirdamai and 10 biswas of village Shadipur were sold, the former for a sum of Rs.23,000 and the latter for Rs.20,000.

On the 14th of September, 1931, an application was made on behalf of the minor by the guardian of the minor to set aside the sale. The grounds taken were, so far as we are concerned in this appeal, that there was no proper proclamation of the proposed sale in the villages and that the property sold was worth over a lakh of rupees. The court of first instance found that there was no proclamation of the proposed sale by beat of drums, but the learned Judge held that it was not an irregularity in the circumstances of the case and he found that the irregularity did not result in any serious loss. He also found that the judgment-debtor was estopped from questioning the value of the property as stated by the decree-holder in his affidavit filed when he applied for sale.

It appears that the evidence on the point is entirely one-sided and there can be no denying the fact that there had been no publication of the proclamation of sale by beat of drums. The law requires that an impending sale should be proclaimed by beat of drums or other customary mode (see order XXI, rules 54 and 67). The

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Bombay High Court in *Trimbak Ravji* v. *Nana* (1) held that a failure to publish the sale proclamation by beat of drums was a material irregularity, and the same view was taken in *Krishna Pershad Singh* v. *Moti Chand* (2). The learned Subordinate Judge has expressed the opinion that in view of the slight change in the language of the Code the old rulings did not hold good. It appears that in order XXI, rule 67, the words "as nearly as may be" have been added, which did not find place in the Code of 1882, section 289. In our opinion, however, this addition does not make any change in the law, where it is possible to proclaim the sale by beat of drums. It has been suggested, but there is no evidence on the point, that the village being in the zamindari of the judgment-debtor nobody would come forward to undertake the beating of drums; but surely a beater could have been hired from some other village and the sale could have been published by beat of drums.

The finding of fact arrived at by the court below stands good, namely, that there was no publication of the sale proclamation by beat of drums.

The second point is whether the irregularity has resulted in any loss to the judgment-debtor.

[After discussing the evidence on this point the Court found in the negative.]

The result is that the appeal fails and is hereby dismissed with costs.

(1) (1886) I.L.R., 10 Bom., 504. (2) (1913) I.L.R., 40 Cal., 635 (642.)

MATRIMONIAL JURISDICTION

Before Mr. Justice Young

ALFRED ROBERT JONES (PETITIONER) *v.* TITLI *alias* TEREZA (RESPONDENT) * 1932 *November*, 14.

Divorce Act (IV of 1869), sections 4, 7, 19—Nullity of marriage—Idiocy—Undeveloped mentality—Consent by person with the mentality of a child—Christian Marriage Act (XV of 1872), sections 4 and 5—Validity as Christian marriage according to rules, rites, and ceremonies of Church—Jurisdiction to deal with such question—Non-publication of banns, effect of—"Rules of Church", meaning of—Canon law, whether binding on civil courts.

An idiot, in law, means something more than mere feeble-mindedness and undeveloped intellect. So, where a man of 54 years of age was from birth feeble-minded and had not developed beyond the intelligence and mentality of a child of 8 or 9 years, it was *held* that he could not be termed an idiot within the meaning of section 19(3) of the Divorce Act but that he was incapable of understanding what the relationship of marriage meant and of giving his consent and thereby contracting a valid marriage. A marriage entered into by such a person was declared null and void under section 19 on the ground of want of consent.

The High Court has jurisdiction to hear and decide questions under the Indian Christian Marriage Act. Such jurisdiction is not negatived by anything contained in section 4 of the Divorce Act. Questions arise under sections 4 and 5 of the Indian Christian Marriage Act when the marriage has not been validly performed, and to deny jurisdiction to the courts to decide such questions would make the Act a dead letter.

A marriage between a Roman Catholic and a Protestant was solemnized by a Priest of the Roman Catholic Church. The banns for the marriage were called only once and the marriage was performed the next day. It appeared that, according to the rules of the Roman Catholic Church, two dispensations from the Bishop were necessary, one for the mixed marriage and another for performing the marriage without due publication of banns; but no dispensation had been obtained: *Held* that the marriage was not solemnized according to the

* Matrimonial Suit No. 3 of 1932.

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rules, rites, ceremonies and customs of the Church of which the person solemnizing the marriage was a Minister, and the marriage was therefore void under sections 4 and 5 of the Indian Christian Marriage Act. Further, the marriage could not be held to be validated by the Canon law of the Roman Church under which, it was said, the marriage would be "gravely unlawful but valid". The civil courts could not interpret or administer the Canon law, but only the civil law. The Canon law in question could not be deemed to be a "rule of the Church" within the meaning of section 5 of the Indian Christian Marriage Act, which has nothing to do with the Canon law.

The English law, to the effect that the absence of due publication of banns can make the marriage void only if the lack of due publication is within the knowledge of both the parties to the marriage, is no guide to the Indian courts, notwithstanding the provisions of section 7 of the Divorce Act; for, in the Indian Christian Marriage Act there is nothing equivalent to the wording in section 22 of the Marriage Act in England which provides that where persons knowingly and wilfully intermarry without due publication of banns, the marriage is void.

Messrs. *K. O. Carleton* and *O. M. Chiene*, for the petitioner.

Messrs. *K. D. Malaviya* and *E. V. David* and Miss *L. W. Clarke*, for the respondent.

YOUNG, J. :—The petitioner, Alfred Robert Jones, of Bhim Tal near Naini Tal, by his sister Miss Edith Jones as his next friend, prays for a decree of nullity of marriage under section 19(3) and (4) of the Indian Divorce Act, and under sections 4 and 5(1) of the Indian Christian Marriage Act for a declaration that his marriage to the respondent is void. To the issues formerly struck under the Indian Divorce Act, section 19, I have added, during the course of the hearing, two other issues under the Indian Christian Marriage Act, namely, No. 7 : "Was the alleged marriage solemnized according to the rules, rites, ceremonies and customs of the Church of Rome?" and No. 8 "Was Father Livesay authorised to perform the ceremony of marriage?"

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The first issue is: "Has this Court jurisdiction to try this suit?" There can be no doubt that by sections 4 and 19 of the Indian Divorce Act this Court has jurisdiction to hear the petition in so far as the issues under section 19 of the Divorce Act are concerned, namely, "Was the marriage null and void on the ground of the petitioner being an idiot at the time of the said marriage?" and, secondly, "Was the said marriage null and void on the ground that the petitioner's consent was obtained by force or fraud?" The difficulty arises concerning the jurisdiction of this Court to hear the petition based on the Indian Christian Marriage Act. It is contended by counsel for the respondent that section 4 of the Indian Divorce Act confines the jurisdiction of this Court to petitions under the Indian Divorce Act. Section 4 of the Divorce Act reads as follows: "The jurisdiction now exercised by the High Courts in respect of divorce *a mensa et thoro* and in all other causes, suits and matters matrimonial shall be exercised by such Courts and by the district courts subject to the provisions in this Act contained and not otherwise." It is argued that because of the terms of this section the High Court is prohibited from considering questions arising under the Indian Christian Marriage Act, and that therefore there is no jurisdiction in this Court to decide whether there has been a valid marriage in accordance with the Indian Christian Marriage Act. There is little authority on this question. Counsel for the respondent relied upon the decision of a single Judge in the Calcutta High Court in *Gasper* v. *Gonsalves* (1). That learned Judge decided that the High Court had jurisdiction in a matrimonial suit only under the Indian Divorce Act, and therefore it had no jurisdiction to hear a petition praying for a declaration that the marriage was invalid under the Indian Christian Marriage Act. This case, however, was decided *ex parte*. The matter was considered in another

(1) (1874) 13 B.L.R., 109.

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case in the Calcutta High Court, *Lopez* v. *Lopez* (1). The Court, however, in that case did not decide this question as it was unnecessary for the decision of the case. The matter was further considered by a single Judge of the Lower Burma Chief Court in *Consterdine* v. *Smaine* (2). The learned Judge decided that the Court had jurisdiction. The Indian Christian Marriage Act became law three years after the Indian Divorce Act. The Indian Divorce Act must have been within the knowledge of the legislature. It is therefore difficult to argue that the High Court had no jurisdiction to decide the very important questions which must arise out of the Indian Christian Marriage Act. If that were so, the Act would be dead. The various grounds on which the Court can give a decree of nullity in the Divorce Act refer to cases where there has been a marriage validly performed. Questions arise under sections 4 and 5 of the Indian Christian Marriage Act when the marriage has not been validly performed. There is a clear distinction between a decree of nullity of a valid marriage and a declaration that the marriage itself is illegal and void. There can, in my opinion, be no doubt that there is jurisdiction in the High Court to hear and decide questions under the Indian Christian Marriage Act.

With regard to the other issues it would be convenient to set out the facts of the case as found by me. The petitioner, A. R. Jones, is 54 years of age. His father and mother were Europeans domiciled in India. He lives upon the estate of his married sister in Bhim Tal near Naini Tal. His father and mother were first cousins, and he was born when his mother was 47 years of age. While his mother was pregnant she indulged freely in alcohol and on several occasions was insensible from the effects of it. The result of these unfortunate circumstances was that Jones was a puny delicate baby and soon showed that his brain was affected. He has

(1) (1885) I. L.R., 12 Cal., 706. (2) (1917) 47 Indian Cases, 545.

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throughout his life been feeble-minded. He was incapable of being educated except to a minor degree, and has always had to be carefully looked after by his relations. He has never been able to earn his living in any capacity. His appearance is peculiar and abnormal. His head is micro-cephalic. As is usual in persons of his mentality, his sexual side is normally or even abnormally developed. Twenty-five years ago he commenced a spasmodic sexual relationship with the respondent, an Indian woman now of some 40 years of age of the Kanera caste, that is, a low caste classed as untouchable. Her Hindu name is Titli (English, Butterfly), her Muhammadan name is Rahiman, and her Christian name is Tereza. The relationship between the petitioner and the respondent up to the time of marriage was the ordinary relationship of a man with a bazar prostitute. The relationship was clandestine and Jones used to meet the respondent in her house or in the jungle. The woman herself says that she has been married first of all to a low caste Hindu, and on his death to a Muhammadan. In order to marry the Muhammadan she says she became a convert to Islam. * * * I am not satisfied that proper marriages were celebrated. It may well be that she was merely in the position of a kept woman. After the relationship with the Muhammadan terminated she recommenced her relationship with the petitioner. In the month of September, 1930, the idea of marriage between Jones and the respondent arose. The respondent says that Jones asked her to marry him, and that he arranged with Father Livesay, a Priest of the Roman Catholic Church who has a mission chapel at Bhowali, to convert her to Roman Catholicism, baptise her into the Church and subsequently marry her to him. The petitioner, on the other hand, says that the relatives of the woman threatened him, saying that if he did not marry her it would be bad for him, and it was through fear of these relatives that he went through the marriage ceremony. Father Livesay took this woman into his compound,

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gave her some little instruction in the tenets of his faith, and eventually received her into the Roman Catholic Church by baptism.

* * * *

Issue No. 3 is: "Was the marriage null and void on the ground of the petitioner being an idiot at the time of the said marriage?"

On this issue the petitioner's sister, Miss Edith Jones, has been called and she gave evidence as to the history of the petitioner. Captain Aitchison, the Civil Surgeon of Allahabad, and Dr. Rahmat Ilahi Siddiqi, L.M.P., Sub-Assistant Surgeon, have also been called. Captain Aitchison, who has taken a great deal of care in this case, had the petitioner, Jones, under observation for some considerable time in Allahabad. He subjected him to the well known Benit Simon tests. His conclusion is as follows: "His intelligence is that of a child. To maintain attention is difficult. There is inaccuracy of memory and extreme suggestibility. He appears to be very impulsive; a little more hasty than the average person. My final diagnosis is that this is a case of amentia amounting to idiocy in its more minor forms and is definitely more than feeble-mindedness." He further says that he would class Jones as equivalent in brain power to a normal child of 6 years. He says that he is a typical text-book picture of a micro-cephalic type of idiot, i.e. small head, large sticking out ears, and what is generally termed a monkey face. He says that the man is incapable of entering into a contract of marriage or any contract, and that he is clearly incapable of managing his own affairs. Dr. Siddiqi arrives at the same opinion. He knew the petitioner in Bhim Tal and had attended him as a doctor. He says that the petitioner is suffering from amentia or congenital idiocy and that he is incapable of managing his own affairs.

The petitioner himself was put in the box and gave evidence. It was obvious to me that he is not normal

and that he has the mentality of a child. He understood, however, the nature of an oath and I allowed him to be sworn. I did not think it wise, however, to allow him to be examined by counsel in the ordinary way. I am quite satisfied that if he had been so examined, his evidence would have been useless. I, therefore, examined him myself, and found that if he were put at his ease and not frightened, he could answer simple questions and give sensible replies. He was in the box under examination by me for over an hour and I had ample opportunity of forming an opinion as to the state of his mind. At the end of his evidence I gave an opportunity to counsel to ask him any question, but very wisely neither counsel took advantage of this. I have considered the very careful evidence of the doctors; but their evidence I can use only as a guide. It is not conclusive. I have to form an opinion myself. I am satisfied that the petitioner is feeble-minded and that he has the intelligence of a child of about 8 or 9 years of age. I do not think that it can be said that he is an idiot within the meaning of section 19(3) of the Indian Divorce Act, which classes lunatics and idiots together. I think an idiot in law means something more than this. An ordinary child of 8 or 9 years old could not be termed an idiot, and equally I do not think that a man of 54 with the mentality of such a child can in law be termed an idiot. I, therefore, decide this issue in favour of the respondent.

Issue No. 4: "Was the said marriage null and void on the ground that the petitioner's consent was obtained by force or fraud?" To this issue I added another sentence, namely, "Did the petitioner consent to the said marriage?" The direct evidence of force or fraud on the part of the respondent or her relatives or Father Livesay is very small. The petitioner himself says that the brother and nephew of the respondent threatened that if he did not marry this woman "it would not be good for him", and that he therefore married her through fear of assault. I believe every word of the petitioner's

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evidence. His mind is too undeveloped for successful lying. I believe him when he says that there was this threat, but I am not satisfied that the threat alone induced him to go through the marriage ceremony with this woman. He says that he did not complain about the threats to any one, and he had ample opportunity to tell either his sister or Father Livesay. He told neither. There is a very great burden on the petitioner to show that a marriage, if otherwise valid, ought to be upset by duress. I have grave suspicion as to this part of the case, but I do not think the petitioner has discharged that burden. As to fraud, no particulars were pleaded in the petition and the evidence is practically nil. It is said by the petitioner that he was told by the respondent's brother that as he had made the woman lose her caste, he must marry her. This would be a misrepresentation, as Mst. Titli had then no caste to lose, but it is well settled that misrepresentation inducing *consent* to marry cannot upset a marriage. The position in law is that the party imposed upon must be deceived to such an extent that there is in reality no consent at all to the marriage. This is not the case here. With regard to the third part of this issue,—whether the petitioner consented to the marriage,—I am satisfied that there was no consent in law by the petitioner. As I have recorded above, the petitioner has the mentality of a child of 9. All civilised countries, as well as the Canon law of the Roman Catholic Church itself, have clearly laid down a minimum age as the age of consent in marriage. Neither in the Roman Catholic Church, in England, or in India, could it be said that a child of 9 years could consent to a marriage, the reason being that it is considered that a child of such tender years could not possibly know what the relationship of marriage meant. Although Jones is 54 years of age, he has, in fact, the mentality of a child and therefore, in my opinion, he is incapable of giving his consent and thereby contracting a valid marriage. While, therefore, I decide

the questions of fraud and force in favour of the respondent, I decide the question of consent in favour of the petitioner.

Issue No. 2: "Was the marriage of the 10th of November, 1930, performed by the Rev. Father Livesay at Bhowali a valid Christian marriage? Was the said marriage performed according to the rules, rites, ceremonies and customs of the Church of Rome and was Father Livesay authorised to solemnize the said marriage?" First as regards the question whether the marriage was performed according to the rules of the Roman Catholic Church. The evidence is that of Father Livesay himself and of the Lord Bishop of Allahabad. Father Livesay confessed that the rules of his Church make two dispensations from the Bishop necessary in this case; one for a mixed marriage (between a Roman Catholic and a Protestant), the other for a marriage without due publication of banns. He himself says that neither of these dispensations were obtained, and that the banns were only called once on the morning before the wedding. * * * The evidence of Father Livesay is confirmed by that of the Lord Bishop of Allahabad. The Bishop said that there ought to have been two dispensations in the case, one for dispensing with the banns and the other for a mixed marriage. Further, he said that if banns are published they must be on three consecutive Sundays, and an interval of three days before the celebration of the marriage must elapse after the last publication of the banns. It is true, the Bishop went on to say, that although this marriage, carried out as it was in complete disregard of the rules of the Church, was gravely unlawful, it would, nevertheless, according to the Canon law of the Roman Church, be valid. This is a distinction unknown to civil law. There was every element of clandestinity about this marriage. Public policy demands the utmost publicity before a marriage can be performed. The Indian Christian Marriage Act makes

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it clear, in cases where marriages are performed by persons other than those who have received episcopal ordination, that the greatest publicity must be accorded to intended marriages. This is necessary in order that any impediment to a marriage may be revealed, and that every one who is interested may be informed of it. A clandestine marriage has always been abhorrent to the law. Section 5 of the Indian Christian Marriage Act in the case of an episcopally ordained person does not insist on these precautions. The reason is that the Churches there enumerated have themselves evolved stringent rules as to publication. According to section 5, any person who has received episcopal ordination, "provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a Minister", may solemnize marriages. Section 4 provides that any such marriage solemnized otherwise than in accordance with the provisions of section 5 shall be void. It is clear, therefore, that any marriage not solemnized according to the rules of the Church is void. It has been contended by counsel for the respondent that the rule of law in England, which by section 7 of the Divorce Act must be taken as a guide by the Indian courts, is that the non-publication of the banns is only a ground of declaring the marriage void if the lack of due publication is within the knowledge of both the parties to the marriage. The English law as regards this is no guide to an Indian court. The English decisions on this point are based on the wording of the Marriage Act in England (4 Geo. IV, c. 76, section 22) which provides that where persons "knowingly and wilfully intermarry without due publication of banns the marriage is void." The English courts have held that the words "knowingly and wilfully intermarry" mean that both the parties to the marriage must have knowledge of the lack of publication. There is nothing equivalent to these words in the Indian Christian Marriage Act. It is strenuously argued by counsel for the

respondent that I must in this case consider the Canon law of the Roman Church and apply it. He contends that the Canon law which declares this marriage "gravely unlawful, but valid" is a "rule" of the Church within the meaning of section 5. I have not been referred to any authority on this point and I know of none. It is impossible so to construe the section. No civil lawyer could interpret or follow the Canon law. In the early Middle Ages the Bench was occupied by the clergy; if the Canon law had to be applied by the Bench now, the clergy would again have to interpret and administer it. In this case, for example, no civil lawyer could understand the proposition that a marriage was "gravely unlawful, but valid". This which appears to a civil lawyer to be a contradiction in terms presents no difficulty to the Canon lawyer. Again, in this case, if I had to follow the Canon law,—both parties having been baptised and the sacrament of marriage celebrated,—I would have to apply the principle of Canon law 1118, "Whom God has joined together let no man put asunder." Thus I would, most reluctantly, have been constrained to hold this marriage valid on the ground that God had joined together this weak-minded European and this Indian prostitute. On the other hand, if the petitioner had *not* been baptised, the Canon law would not hold these two to have been joined together by God,—though a priest had celebrated the sacrament,—and I could then have declared the marriage invalid. No doubt these laws are clear to the Canon lawyer, but the civil courts would have great difficulty in understanding, construing, and administering them. They appertain to faith rather than to law and must be left to the Church. I have only to interpret the civil law as enacted by the Indian Christian Marriage Act. "Rules" in section 5 refer to those things which must be done before the ceremony of marriage can be performed. The section deals only with the necessary preliminaries to the ceremony, the ceremony itself, and the person who performs

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it. It has nothing to do with Canon law. This marriage has not been solemnized according to the rules of the Roman Catholic Church, and therefore it is void.

After having arrived at the above conclusion, it is clear to my mind that Father Livesay was not authorised to solemnize the marriage. Section 5 of the Act exempts an episcopally ordained person from the ordinary rules of marriage set out in section 12 and onwards in part III of the Christian Marriage Act. A person who has received episcopal ordination is authorised to solemnize a marriage *provided* that the marriage be solemnized according to the rules of his Church. In this case almost every essential rule of the Church has been deliberately broken, and therefore, in my opinion, Father Livesay was not an authorised person within the meaning of section 5 of the Act. From this point of view too the marriage must be declared void. It is unnecessary to decide issue No. 5 in this case, in view of the above findings. The petitioner is entitled to a decree of nullity of marriage on the ground of lack of consent and to a declaration that his marriage is void. I direct that a copy of this judgment be sent to the Lord Bishop of Allahabad for his information.

MISCELLANEOUS CIVIL

Before Mr. Justice Bennet and Mr. Justice Bajpai

1932
November, 16.

BALA PRASAD (APPLICANT) *v.* BALKRISHAN AND ANOTHER (OPPOSITE PARTIES) *

Civil Procedure Code, order XLVII, rule 1—*Review of judgment—Error of law whether ground for review—"Apparent on the face of the record."*

An application for review of judgment under order XLVII, rule 1 of the Civil Procedure Code does not lie on the ground of an error of law.

Even if it did, in the present case there was not any error of law so patent that it could be said to be apparent on the face of the record.

* Application for review of judgment in Second Appeal No. 26 of 1929.

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BALA PRASAD v. BALKRISHAN

Mr. *K. N. Laghate,* for the applicant.

Mr. *M. N. Kaul,* for the opposite parties.

BENNET and BAJPAI, JJ. :—This is an application for a review of judgment under order XLVII, rule 1, filed by a respondent to a second appeal which was decided by a Bench of two Judges of this Court, neither of whom is now a member of the Bench. The second appeal was decided on the 16th of June, 1931, and the term of office of one of these Judges was terminating on the 4th of August, 1931. On the 4th of August, 1931, this application for review was presented; that is, it was presented after an interval of seven weeks and on a date which made it impossible that it should be heard by the two Judges who composed the Bench which disposed of the second appeal. The second appeal was brought by the plaintiffs, and the first ground was as follows: "Because the plaintiffs were entitled to realise their mortgage money in full from any mortgaged property and the decree declaring proportionate liability of properties possessed by defendants Nos. 2 and 5 is contrary to law." This was the main question argued in the second appeal, and this Court allowed the contention of the plaintiffs appellants. The grounds of review before us are extremely vague, and it is stated in the first ground: "Because all the parties and the properties having been included in the suit, this Court has erred in not adjudicating the respective rights and liabilities of all the parties before it, especially when the plaintiff claimed to put the entire burden on a portion of the property." From the explanation of the learned counsel for the applicant, who is defendant No. 2, one Bala Prasad, a respondent in the second appeal, we understand that the question which it is now desired to raise is exactly the same question which was raised in ground No. 1 of the second appeal. The learned counsel justified his attempt at what is practically a re-hearing of the second appeal, by stating that there was an error

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apparent on the face of the record within the meaning of order XLVII, rule 1. This error, according to him, is an error of law, and his proposition was that when the plaintiffs released a part of the property mortgaged from their claim, the plaintiffs were not entitled to put the entire burden of the mortgage debt on the other property. It was argued for the applicant in review that an error of law may be the subject of a review, and that this proposition was laid down in *Murari Rao* v. *Balavanth Dikshit* (1). It is true that that ruling does state on page 957: "In the present case the District Judge was guilty of an error of law, but an error so patent that we think it can be said to be 'apparent on the face of the record'." And on page 958 it is stated: "We are not prepared to accept appellants' contention that the word 'error' must necessarily be limited to errors of fact, but consider that there are cases in which an error of law can also come within the meaning of the rule." We consider that even if we were to follow this ruling we could not say that in the present case there was any error of law so patent that it could be said to be apparent on the face of the record. The point of law which the learned counsel for the applicant desires to establish is a point which he could only establish after argument and reference to authorities. It is certainly not a point which is apparent on the face of the record; nor is it a point so simple as to carry conviction when it is stated. We consider, however, that we are bound by the ruling of their Lordships of the Privy Council in *Chhajju Ram* v. *Neki* (2). In this case it is stated on page 131: "The plaintiffs then applied, under order XLVII, rule 1 of the Code of Civil Procedure for a review of the judgment of the Division Bench, on the ground that the Division Bench ought not to have admitted the additional ground of appeal, and that the learned Judges were misled into holding that the facts found

(1) (1923) I.L.R., 46 Mad., 955. (2) (1922) I.L.R., 3 Lah., 127.

by them disentitled the plaintiffs to a decree." It is clear that the grounds in that case were alleged errors of law. It was held on page 135 by their Lordships: "They think that rule 1 of order XLVII must be read as in itself definitive of the limits within which review is today permitted, and the reference to practice under former and different statutes is misleading. So construing it they interpret the words 'any other sufficient reason' as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. Such an interpretation excludes from the power of review conferred the course taken by the second and third Division Benches." Their Lordships therefore held that no review would lie on the alleged error of law. As regards the words "error apparent on the face of the record", at page 133 their Lordships stated: "The three cases in which alone mere review is permitted are those of new material overlooked by excusable misfortune, mistake or error apparent on the face of the record, or 'any other sufficient reason'. The first two alternatives do not apply in the present case, and the expression 'sufficient', if this were all, would naturally be read as meaning sufficiency of a kind analogous to the two already specified, that is to say, to excusable failure to bring to the notice of the court new and important matters, or error on the face of the record." This passage indicates that their Lordships held that the application for review in that case would not come under the heading of "mistake or error apparent on the face of the record" and that it would only come, if it would come at all, under the words "any other sufficient reason". They then proceeded to say that it did not come under those words. It therefore must be taken that their Lordships have negatived the proposition of the present applicant that an error in law will come under the words "error apparent on the face of the record". Accordingly we refuse this application for review with costs.

APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Bajpai

1932 *November*, 18.

AHMADI BEGAM (DECREE-HOLDER) *v.* ISHAQ MUHAMMAD (JUDGMENT-DEBTOR) *

Civil Procedure Code, order XXI, rule 89—Whether deposit by judgment-debtor is tantamount to "receipt" by decree-holder—Auction purchaser, even if he is the decree-holder, is entitled to 5 per cent. of purchase money.

When money has been deposited in court by the judgment-debtor for the decree-holder and that money is available to the decree-holder without any obstacle of law, then that deposit amounts to receipt by the decree-holder within the meaning of order XXI, rule 89 of the Civil Procedure Code. So, where a sum of money had been deposited in court by the judgment-debtor towards the decretal amount before the auction sale, it was *held* that such sum could be taken into account to supplement the deposit actually made at the time of an application under order XXI, rule 89, by the judgment-debtor, in order to find out whether the requirements of that rule regarding the amount were complied with.

The auction purchaser is entitled to 5 per cent. of the purchase money under order XXI, rule 89, even where he is the decree-holder himself.

Mr. *A. M. Khwaja*, for the appellant.

Messrs. *P. L. Banerji* and *M. A. Aziz*, for the respondents.

BENNET and BAJPAI, JJ. :—This is an execution first appeal by the auction purchaser decree-holder against an order of the court below setting aside a certain sale under the provisions of order XXI, rule 89 of the Code of Civil Procedure. It is not necessary to state the facts in greater detail than is necessary to make our judgment intelligible. It appears that Bibi Ahmadi Begam obtained a decree against Ishaq Muhammad for a large sum of money and in execution of that decree certain properties belonging to the judgment-debtor

* Execution First Appeal No. 14 of 1932, from a decree of Muhammad Aqib Nomani, Subordinate Judge of Agra, dated the 24th of October, 1931.

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were advertised for sale. On the 23rd of June, 1931, the judgment-debtor brought a sum of Rs.5,000 in court and under the orders of the court the said sum was received towards the decretal amount. We have on the record of this case the tender evidencing such a deposit. The sale, however, was held on that very date, because certain communications that were intended to reach the Amin could not reach in time. On the 22nd of August, 1931, however, this sale was set aside and a fresh sale was ordered to be held on the 24th of August, 1931. In spite of the efforts of the judgment-debtor to get the sale postponed, the sale was held on that date and the property was purchased by the decree-holder for Rs.39,000. On the 14th of September, 1931, the judgment-debtor applied under order XXI, rule 89, for setting aside the sale and tendered in court the sum of Rs.71,597-4-9. On receipt of this amount the court below set aside the sale.

It is true that the provisions of order XXI, rule 89, are by way of indulgence to the judgment-debtor and they should therefore be strictly complied with, and the question that we have got to decide is whether this sum coupled with the prior sum of Rs.5,000 deposited at an earlier date is sufficient under the provisions of the above order for the setting aside of the sale. A subsidiary question also arises whether the sum of Rs.5,000 can at all be taken into account. It is conceded by the learned counsel for the appellant that if the earlier sum of Rs.5,000 is taken into account the deposit is full. It is, however, argued on his behalf that the aforesaid sum should not be taken into consideration inasmuch as that sum had not been *received* by the decree-holder. In support of his contention he has cited the case of *Totaram Chunilalshet* v. *Chhotu Motiramshet* (1). The judgment in that case does not state the facts but it simply follows an earlier decision

(1) A.I.R., 1923 Bom., 299.

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reported in *Trimbak Narayan* v. *Ramchandra Narsingrao* (1). The facts of that case were that two properties were sold in different lots and the judgment-debtor applied to have the sale of one item of property set aside and he wanted to have the sale proceeds of the other lot to be taken into account along with the deposit that he actually made for setting aside the sale of the property for which he had applied, and it was held by the learned Judges that this could not be done inasmuch as mere payment of sale proceeds into court was not a sufficient compliance with the requirements of section 310A of the Code of Civil Procedure. It is true that towards the end of their judgment they say that "what the section contemplates is evidently an *actual receipt* by the decree-holder, and we think that nothing less than that will satisfy its requirements", but in an earlier portion they say: "It cannot be said that the decree-holder has received the sale proceeds of the *Munjari* property when in point of fact they have only been paid into court, and the decree-holder may never receive them at all, because the purchaser may become entitled to receive the money back under the provisions of section 315." It is thus clear that the learned Judges based their decision on the ground that the sale proceeds in court might not become available to the decree-holder if the sale was ultimately set aside. The learned counsel for the appellant also relies on the case of *Karunakara Menon* v. *Krishna Menon* (2). The facts of that case were different and it was held therein that a judgment-debtor who applies under order XXI, rule 89, cannot take credit for any amount paid by a co-judgment-debtor who has not joined him in the application. At page 431 their Lordships say: "If the monies had been deposited by the applicants themselves, such monies can be taken to supplement the deposit actually made at the time of the application to set aside the sale." It is clear, therefore, that a

(1) (1899) I.L.R., 23 Bom., 723. (2) (1915) I.L.R., 39 Mad., 429.

distinction has been drawn in that case between 'actual receipt' and 'deposit' in court. We are of the opinion that when money has been deposited in court and that money is available to the decree-holder without any obstacle of law, then that deposit amounts to receipt by the decree-holder. In the case of *Kripa Nath Pal* v. *Ram Lakshmi Dasya* (1) Mr. Justice AMEER ALI says: "As at present advised I am of opinion that the word 'received' in section 310A ought to be construed to mean sums of money either actually received by the decree-holder or which he is in a position to credit to his account." We are in perfect agreement with this view of the law.

Another point taken by the appellant is that he is entitled to a sum equal to 5 per cent. of the purchase money. The court below repelled this contention of the decree-holder on the ground that he, being the auction purchaser, is not entitled to the 5 per cent. It is well settled that if the decree-holder be the purchaser he is entitled to the 5 per cent. on the purchase money; *vide* the Full Bench case of *Chundi Charan Mandal* v. *Banke Behary Lal* (2), and indeed it was conceded before us that the judgment of the court below on that point was wrong. The result is that we allow the appeal to this extent that we hold that the decree-holder is entitled to obtain from the amount deposited in court a sum equal to 5 per cent. of the purchase money also. As the amount deposited, together with the Rs.5,000 tendered on an earlier date, is sufficient to meet every claim, the sale will be set aside. The judgment-debtor and the mortgagee are entitled to withdraw any surplus after the above calculation.

(1) (1897) 1 C.W.N., 703.

(2) (1899) I.L.R., 26 Cal., 449.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Niamat-ullah

RATAN BARHAI (DEFENDANT) *v.* KISHEN DEI (PLAINTIFF) *

1932
November, 25.

Landlord and tenant—Abadi land—Sahan darwaza *or courtyard outside the house of a raiyat—Raiyat's right to build on the* sahan darwaza *appurtenant to his house—License.*

A raiyat in a village abadi is not entitled to build as of right and without the consent of the zamindar on land which he has been using as an outer *sahan* or courtyard appurtenant to his house.

The question whether he has a right to build on any land appertaining to his house and not enclosed within it is one of fact to be determined on proof of the terms of the license, by direct evidence or by inference from the conduct of the parties and the use to which the land has been put.

Mr. *Shiva Prasad Sinha*, for the appellant.

Mr. *L. M. Roy*, for the respondent.

MUKERJI, A. C. J.:—This second appeal raises an important point of law, and there is unfortunately no case decided by a Bench of this Court which may be directly to the point. The point raised is whether a raiyat in a village abadi in this part of the country has a right to construct a building on land which he was using as an outer "*sahan*" appurtenant to his house.

The plaintiff, who is a zamindar, came with the allegation that the defendant had constructed a building without her consent, and sought the ejectment of the tenant from the land and demolition of the building. The learned Judge of the appellate court found that a part of the building was old, that the rest was new and that the new portion had been erected on what had been the defendant's *sahan* or courtyard, outside the house. On this finding he decreed the suit. In this Court it has been contended that a raiyat is entitled to

* Second Appeal No. 168 of 1930, from a decree of Jagan Nath Singh, Additional Subordinate Judge of Basti, dated the 19th of December, 1929, modifying a decree of Krishna Chandra, Munsif of Basti, dated the 22nd of June, 1929.

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build on the open space which he enjoys as his courtyard appurtenant to his house.

Before we examine such authorities as may be on the point, let us consider the situation from the legal point of view. A raiyat holds either under a lease or under a license. If there is a lease and if the lease contains a term entitling the raiyat to build on any land that may be in his possession, the terms have to be proved. In this case no such lease has been pleaded and no terms like those have been established. In the absence of the lease we can regard a raiyat only as a licensee, who has been allowed, with the implied consent of the zamindar, to build on the zamindar's land. This further implies that the license that was granted to the raiyat was a permission to use the land in his occupation in the way in which he has been allowed to use. In other words, where there is a house existing on a portion of the land, it will be presumed that he was allowed to build on that portion of the land; and where the land is vacant, it will be presumed that he was allowed to occupy that land as his courtyard, without any building thereon. I am not aware of any third method of a raiyat in a village abadi holding land.

If this be the right view of the position of the raiyat, he cannot certainly build on what was his outer *sahan*.

Coming to authorities, it has been held by a Bench of this Court that a tenant can dig a well in his courtyard; *Mahadeo Rai* v. *Jan Muhammad* (1). This case does not establish the proposition for which the appellant contends—that he can build on the land. A well usually occupies a very small portion of land, and further it is necessary for supply of the essential necessity for life, water. The very existence of man depends on a supply of water, and there cannot be any difficulty in implying that the contract or license under which the raiyat holds included the right to construct a

(1) (1925) I.L.R., 47 All., 541.

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well. If a man has to live on a piece of land, he may do all that is necessary for the purpose.

We have got a few other cases decided by single Judges of this Court; but most of them may be distinguished. In one case, *Padarath Tewari* v. *Baz Singh* (1), it was found that a piece of land was being used for making jaggery and there was already some sort of shed over the place. It was presumed that the land had been given for the purpose for which it was being used and that the tenant could build a house on that land for the same purpose for which the land had been used. This case is, in my opinion, distinguishable. The license was already there to use the land in a particular way. There cannot exist any sugarcane press and cattle trough or cattle shed without the zamindar's permission. That permission might be taken, in a particular case, as implying further permission to erect a more substantial building than a mere thatch. In *Ram Pratap Singh* v. *Lal Bahadur Singh* (2), which was again decided by a single Judge, the headnote runs as follows: "A raiyat in a village is entitled to put the *sahan* of his house to such use as suits his convenience, provided that by doing so he does not, in any way, adversely affect the proprietary rights of the zamindar." The qualifications quoted above, under which a raiyat may construct a building on a portion of land occupied by him, are sufficient to show that the raiyat has no right to do with the land what he pleases. The constructions in this case were a stable, a pigeon house and a cattle trough. If this case may be taken as going beyond the position which I have taken under the general principles of law, I have to respectfully dissent from this case. I can point out that in this country nobody can live in a house without having some land in front of his house for the purposes of using it as a *sahan*. We find that in cities

(1) (1915) 29 Indian Cases, 264.

(2) (1927) 100 Indian Cases, 597.

people have to put their *charpais* or cots on the streets in order to have a little breath of fresh air. If a raiyat be entitled, as a matter of right, to build upon his *sahan*, he would require a portion of land beyond this building for use as a piece of open *sahan*, and he would naturally have to trespass on his zamindar's land, unless he is able to get that land by the consent of the zamindar. It is, therefore, to the interest of the zamindar to see that the *sahan* land, which was granted to the raiyat for use as open and vacant land is not utilised, permanently, by being built upon. The third case that was cited before us is that of *Farhatullah* v. *Mohammad* (1). This is again a decision by a learned single Judge and perhaps goes a little too far. I have already noticed the case of *Mahadeo Rai* v. *Jan Muhammad* (2), where it was held that a tenant was entitled to sink a well in his courtyard.

Having regard to all the circumstances of the case I am of opinion that the appellant was not entitled, as a matter of right, and without the consent of the zamindar, the plaintiff, to build on what was the raiyat's outer *sahan* of his house.

A question of limitation was also raised in the course of hearing; but we could not allow it to be raised, because sufficient material did not exist on the record. The argument was that article 32 of the Limitation Act applied; but to apply article 32 we have to find out when the plaintiff became aware of the existence of the perverted use of the land. As to that there was no allegation and there was no finding. The defendant has not shown that the plaintiff was aware of the construction more than two years before the institution of the suit. All that the plaintiff stated in the plaint was the date of the construction, which need not necessarily coincide with the date of her knowledge of the factum of construction.

In the result I would dismiss the appeal with costs.

(1) A.I.R., 1930 All., 89. (2) (1925) I.L.R., 47 All., 541.

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NIAMAT-ULLAH, J. :—I agree entirely with what has been said by my learned brother on the main issue arising in the case. I would add a few remarks of my own to emphasise the point whether as a general rule a raiyat in a village is entitled to make constructions on what is popularly called "*sahan darwaza*".

The land in question in this case is an open space lying to the north of the defendant's house. To the east of that land is the defendant's cattle shed. The new construction is on the northern boundary of the open space of land above referred to. The defendant does not claim to be more than a raiyat, that is, a licensee. There is no evidence of the terms of the grant of license under which he became entitled to construct his house or to occupy the land in front of his house. We must, therefore, infer the conditions on which he was allowed to occupy the site of his house and the land in dispute from the conduct of the parties and the use of the land. So far as the site of the house is concerned, there can be no doubt that the license extended to the defendant a right to build on any portion of it. As regards the open space in front of his house, the defendant has merely used it as a courtyard. The fact that he has got a cattle shed to the east of it does not give rise to the inference that the open space in question is an integral part thereof. There is no justification for the assumption that the courtyard was not in the occupation of the defendant under a license of a different character from that under which he constructed his residential house. It is at least possible that the landlord allowed him to make constructions on the site of his house and allowed the open space to be merely used as a courtyard. The defendant may be in occupation of the site of the house and of the *sahan* under two different licenses. It is likewise possible that the license in respect of the latter may be only implied in the acquiescence of the landlord. If the

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defendant claims a right to make constructions on the courtyard, he must adduce evidence to establish that permission to build extended not only to the site of the house but to the open space in question. The mere fact that he is in possession of both does not justify the inference that seems to have been made in some of the reported cases to which my learned brother has referred, namely, that he is entitled to make construction on every portion of the land which is in his occupation. If the terms of the grant have to be inferred from the use of the land in dispute, there is nothing in the circumstances of this case which can justify the inference that the defendant is entitled to construct on any portion of the courtyard in his possession. I am clearly of opinion that no general rule can be laid down as regards a riaya's right to build on land, not within the enclosed portion of the house which is generally called "*sahan andaruni*", which may appertain to his residential house. The question whether he has a right to build on any land appertaining to his house is one of fact to be determined on proof of the terms of the license, by direct evidence or by inference from the conduct of the parties and the use to which the land has been put. For these reasons I concur in the order dismissing the appeal with costs.

Niamat-ullah J.

Before Mr. Justice Niamat-ullah and Mr. Justice Bennet

KALLAN AND OTHERS (DEFENDANTS) *v.* MUHAMMAD NABI KHAN (PLAINTIFF) *

1932 *November*, 29.

Limitation Act (IX of 1908), articles 142 and 144—Suit for possession of immovable property based on title—Defendant alleging ownership but not proving any title—Adverse possession—Burden of proof on defendant.

Article 144 of the Limitation Act, and not article 142, is applicable when plaintiff sues for possession of immovable property on the basis of title; and where the plaintiff proves his

* Second Appeal No. 154 of 1931, from a decree of Pran Nath Agha, Additional Subordinate Judge of Moradabad, dated the 30th of October, 1930, reversing a decree of Kaustubha Nand Joshi, Munsif of Moradabad, dated the 14th of June, 1930.

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title he is entitled to a decree unless the defendant succeeds in establishing his adverse possession for more than 12 years.

Where a purchaser of a house sued for possession on the allegation that the defendant was a tenant of the plaintiff's vendor, but the defendant alleged that he was the owner and denied that he ever was a tenant, but the defendant failed to prove any title, and on the other hand the plaintiff proved his title but did not prove any tenancy, it was *held* that the case came under article 144 of the Limitation Act and it was for the defendant to establish adverse possession for over 12 years and not for the plaintiff to prove that he or his predecessor in interest was in possession within 12 years preceding the suit.

Mr. *A. M. Khwaja*, for the appellants.

Messrs. *Mukhtar Ahmad* and *S. K. Dar*, for the respondents.

NIAMAT-ULLAH and BENNET, JJ. :—This is a second appeal by defendants Nos. 1, 3 and 4 against a decree of the lower appellate court granting the plaintiff possession of a certain house. The suit of the plaintiff was brought on the 31st of July, 1929, on a sale deed, dated the 23rd of May, 1929, by defendant No. 2, Mst. Ahmadi Begam, of the house in question along with other property to the plaintiff. The plaint set forth that defendant No. 1, Kallan, was a tenant of the vendor, Mst. Ahmadi Begam, paying rent to her and liable to be ejected at any time. The plaintiff issued a notice on the 6th of June, 1929, to defendant No. 1 to vacate the house and defendant No. 1 sent a reply denying that he was a tenant and alleging that he was the owner. The written statement of defendant No. 1 was that he was the absolute owner of the house and had been in adverse proprietary possession for more than 17 years and that Mst. Ahmadi Begam had never been in possession and had never been the owner of the house. Subsequently, the parties made statements under order X, rule 1, and Kallan stated that he did not know who was the owner of the house, that his

father-in-law, Hamid Ullah, used to reside in the house and had no issue and died 20 or 22 years ago. The statement that the father-in-law had no issue apparently means that the father-in-law had no issue other than the wife of Kallan. Accordingly amendments of the plaint were allowed on the 30th of January, 1930, and the 7th of February, 1930, and Mst. Shahzadi, the daughter of Hamid Ullah and wife of Kallan, was added as defendant No. 5 and their two sons as defendants Nos. 3 and 4. The court of first instance framed issues as follows :

(1) Is plaintiff the owner of the house in suit?

(2) Have defendants acquired any right to it by adverse possession?

(3) To what sum, if any, is plaintiff entitled as mesne profits?

(4) Is plaintiff or his predecessor in interest in possession within 12 years, and, if not, is the suit barred by time?

The court of first instance dismissed the suit of the plaintiff on the ground that the plaintiff had to prove that he was in possession within 12 years before the institution of the suit and that plaintiff had failed to prove this. It was also found by that court that "To me it appears that Ahmadi Begam, finding that she had lost her claim to the house by being kept out of possession for over 12 years, sold the house to plaintiff with a view that plaintiff might try his chance by a law suit." The plaintiff appealed and the lower appellate court has decreed the suit. The lower appellate court held, following a ruling in *Kanhaiya Lal* v. *Girwar* (1), that article 144 applied to this suit as the plaintiff sues for possession of an immovable property on the basis of his title, and in such a suit if the plaintiff proves his title he is entitled to a decree unless the defendant succeeds in

(1) (1929) I.L.R., 51 All., 1042.

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establishing his adverse possession for a period of more than 12 years, and that article 142 is restricted to cases in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title, and the burden of proving in such cases that the plaintiff was in possession and was dispossessed within 12 years from the date of the suit lies on the plaintiff.

In second appeal the correctness of this doctrine of law has been challenged and also it has been shown that the finding of the lower appellate court in regard to title is not supported by evidence, and further that there is no definite finding in regard to the period of possession by the defendants and whether the defendants have done acts which assert adverse possession. We will first look to the points in regard to proof of title and the findings in regard to possession and then we will deal with the law which should be applied by the lower court to this case. [The judgment then discussed the evidence and came to the following conclusion in regard to proof of title.] We consider therefore that in the present case it is necessary to remand this case for a finding on issue No. 1, "Is the plaintiff owner of the house in suit?" On this issue it will be open to the parties to produce further evidence.

Now if the plaintiff succeeds in proving his title, we consider that the article of the Limitation Act to apply will be article 144 and accordingly there should be a clear finding on issue No. 2, "Have defendants acquired any right to the house by adverse possession?" The finding of the lower appellate court is that the defendants have failed to prove that they have acquired any right to the house in dispute by adverse possession. But in discussing the evidence of witnesses who stated that the defendants had been in possession for more than 12 years the lower appellate court has not come to a finding as to whether defendants have or have not

been in possession for more than 12 years. It is necessary that there should be a clear finding on this point. Further, if the lower appellate court finds that defendants have been in possession for more than 12 years, it is necessary that the lower appellate court should come to a finding as to whether that possession has been adverse to the plaintiff and the predecessor of the plaintiff or not. That is, it is necessary for the court to find whether the defendants have asserted their title as owners of the house.

We now turn to the question of law on the subject, and learned counsel for the appellants has challenged the correctness of the law laid down in *Kanhaiya Lal* v. *Girwar* (1). The legal argument of counsel for the appellants was that it is not correct to say that where plaintiff proves his title he is entitled to the benefit of article 144, but that in this case also plaintiff should come under article 142; that the view of law laid down in the ruling in question is incorrect because a suit brought by a person who is dispossessed without his consent from immovable property otherwise than in due course of law can only come under section 9 of the Specific Relief Act and the period for such a suit is limited under article 3 of the Limitation Act to six months from the date of dispossession. He therefore argues that suits for possession on a possessory title are limited to six months by article 3 and they cannot be the only class of suits which come under article 142. Otherwise the period of 12 years would be in conflict with the period of six months laid down by article 3. No direct authority was shown to us for the proposition of law advanced by the learned counsel for the appellants. It is true that a majority of the Patna High Court in the Full Bench ruling in *Raja Shiva Prasad Singh* v. *Hira Singh* (2) held that in a suit for ejectment the plaintiff must not only prove his title but also that he has been in possession within 12 years from

(1) (1929) I.L.R., 51 All., 1042. (2) (1921) 6 Pat. L.J., 478.

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the date of the institution of the suit. The view of law contained in *Kanhaiya Lal* v. *Girwar* (1) is a view which has been expressed in a number of rulings in this Court, and it is founded on the ruling of their Lordships of the Privy Council in *Secretary of State for India* v. *Chellikani Rama Rao* (2) where it was held at page 632 that the proper article to apply was 144. We will also refer to *Kamakhya Narayan Singh* v. *Ram Raksha Singh* (3) at page 659 where their Lordships state as follows: "In fact, the evidence shows that the then proprietor of the Raj refused to recognize the defendant's predecessors as his tenants. In these circumstances their Lordships are of opinion that the plaintiff failed to prove that the relationship of landlord and tenant, on which he relied, was in existence within 12 years prior to the institution of his suit, and that, therefore, the plaintiff's suit for possession was barred by the Limitation Act." In this passage their Lordships are apparently applying the principle of article 144 and not of article 142. In *Mohammad Ishaq* v. *Zindi Begam* (4) the following passage occurs in the judgment of a Bench of this Court: "The plaintiffs' title was proved and if the title was with the plaintiffs they were entitled to succeed unless the defendant proved that that title had been lost on account of adverse possession on the part of the defendant." In *Muthoora Palliath* v. *Muthoora Palliath* (5) their Lordships have laid down as follows: "Standing a title in "A", the alleged adverse possession of "B" must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Accordingly when the holder of title proves, as in their Lordships' view he does with some fullness prove in the present case, that he too has been exercising during the currency of

(1) (1929) I.L.R., 51 All., 1042.
(2) (1916) I.L.R., 39 Mad., 617.
(3) (1928) I.L.R., 7 Pat., 649.
(4) (1931) 134 Indian Cases, 461.
(5) (1921) I.L.R., 44 Mad., 883 (890).

his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds." In *Jai Chand Bahadur* v. *Girwar Singh* (1) this principle has also been followed and it has been definitely held that the correct article to apply in cases like the present is article 144 and not article 142. There are also a number of unreported rulings of this Court in which this principle has been followed, e.g. *Mohammad Habibul Rahman Khan* v. *Babu Sant Lal* (2) and *Maharaja Prabhu Narain Singh* v. *Bhagwan Das* (3). Against the numerous rulings of this Court none to the contrary have been shown for the appellant. We therefore consider that there is no reason why we should depart from what has been the established practice of this Court in this matter.

We may mention that the present plaint does not allege that the plaintiff while in possession was dispossessed. On the contrary, the present plaint sets up a title in the plaintiff and alleges that only shortly before the plaint the defendant No. 1, who was in possession as a tenant, wrongfully denied the title of the plaintiff and alleged that he himself was the owner.

Accordingly we remand the case to the lower appellate court to arrive at findings on issues Nos. 1 and 2 in accordance with these directions of law. On both these issues we allow the parties to produce fresh evidence. The finding should be returned to this Court within a period of two months and 10 days will be allowed for objections.

(1) (1919) 17 A.L.J., 814.

(2) S.A. No. 760 of 1929, decided on the 6th of January, 1932.

(3) S. A. No. 154 of 1929, decided on the 18th of December, 1930.

REVISIONAL CIVIL

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Thom

1932 December, 2.

PIARE LAL (APPLICANT) *v.* BHAGWAN DAS AND ANOTHER (OPPOSITE PARTIES) *

Civil Procedure Code, order XXXIII, rules 2 and 5—Application for leave to sue as pauper—Verification defective—Civil Procedure Code, sections 151, 153; *order VI, rule* 15(2)*—Duty of court to give opportunity for amendment of verification—Rejection of application without giving such opportunity—Abuse of the process of the court—Civil Procedure Code, section* 115*—Material irregularity in the exercise of jurisdiction—"Case decided".*

An application for leave to sue as a pauper was rejected under rule 5 of order XXXIII of the Civil Procedure Code on the ground that the requirements of rule 2 regarding verification were not complied with inasmuch as the verification was not in accordance with order VI, rule 15(2). *Held*, in revision,—

A revision lies from an order rejecting an application for leave to sue as a pauper.

Section 153 of the Civil Procedure Code says not only that the court may at any time amend any defect or error in any proceeding in a suit, but it further emphasises the duty of the court by saying that all necessary amendments shall be made for the purpose of determining the real question in issue. It was the duty of the court, when it found that a defect in verification was there, to offer an opportunity to the applicant to correct the verification. The court had failed to use the powers conferred on it by section 153, and this improper procedure, which had led to a denial of justice and frustrated the object for which the courts exist, amounted to material irregularity in the exercise of its jurisdiction within the meaning of section 115 and a revision was maintainable.

It would amount to an abuse of the process of the court within the meaning of section 151 of the Civil Procedure Code if the applicant had to make a fresh application for permission to sue as a pauper simply because his first application was rejected on the mere technicality that it was badly verified.

* Civil Revision No. 305 of 1932.

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Messrs. *K. Verma* and *G. S. Pathak*, for the applicant.

Mr. *B. Malik*, for the opposite parties.

MUKERJI, A. C. J., and THOM, J. :—These are four applications in revision and are directed against four orders by which the petitions of the applicant for permission to sue as a pauper have been rejected.

It appears that the applicant Peare Lal filed four applications in the same court for permission to sue as a pauper. The applications were directed against different opposite parties. The court below came to the conclusion that the applicant was entitled to sue as a pauper, but was of opinion that his applications must be rejected because the verification at the foot of the applications was not according to law.

The applications did, as they should, take the form of a plaint and contain the necessary allegations that were required to be made in a plaint but were not so verified as a plaint should be. The law (order VI, rule 15 of the Code of Civil Procedure) says: "The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true." The verification contained in the several petitions was to the effect that the statements made were true to the knowledge and belief of the applicant. The applicant did not say which of the statements he verified from his personal knowledge and which he verified from information received and believed to be true.

Order XXXIII, rule 5, says: "The court shall reject an application for permission to sue as a pauper, (*a*) where it is not framed and presented in the manner prescribed by rules 2 and 3, or etc." Rule 2 referred to states that "Every application for permission to sue as a pauper shall . . . be signed and verified

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in the manner prescribed for the signing and verification of pleadings." This means that the verification should be in the manner indicated in order VI, rule 15(2) of the Code of Civil Procedure.

The applicant has come up before us in revision and says that the court ought to have directed an amendment of the verification and that, if he had failed to correct the verification, then certainly it was open to the court below to dismiss his application.

On behalf of the respondents (some of whom have not appeared) it is contended that no revision lies and the petitions in revision cannot be maintained.

It has been held in several cases in this Court that where a court admits an application to sue as a pauper and thereby converts the application into a plaint, no revision is maintainable to contest the validity of the order accepting the application for permission to sue as a pauper; but where the order is one rejecting the application and thereby putting an end to the proceedings before the court below, a revision is maintainable. The latest case on this point is *Sumitra Devi* v. *Hazari Lal* (1). Then it was argued by the learned counsel for the respondent that the power of the High Court to interfere in revision is confined to a case of jurisdiction alone and the High Court cannot interfere if the court below has committed an error of law or of fact. There can be no doubt that this is a correct view of the law so far as it goes, and in the case of a mere mistake of fact or of law by a subordinate court the High Court cannot interfere with it in revision. Such was a case which went up before their Lordships of the Privy Council, see *Amir Hassan Khan* v. *Sheo Baksh Singh* (2). In that case the question was whether the decision of the court below that the suit was not barred by sections 13 and 43 of the Civil Procedure Code

(1) (1930) I.L.R., 52 All., 927.

(2) (1884) I.L.R., 11 Cal., 6.

of 1877 was a correct decision. The Judicial Commissioner of Oudh acting as a High Court decided that the suit was barred and their Lordships of the Privy Council held that the High Court had overstepped its function.

Section 115(*c*) states that where in the exercise of its jurisdiction a court acts illegally or with material irregularity the High Court may interfere. This means that where the subordinate court is possessed of jurisdiction and in the exercise of it acts illegally or with material irregularity a revision is maintainable. Acting illegally or with material irregularity does not mean committing an error in the decision arrived at; but where a procedure has been adopted which is grossly improper and which has led to a denial of justice, it may surely be said that the court has acted with material irregularity in the exercise of its jurisdiction. Accordingly it has been held that where an award has been made and a court upholds it without giving the parties a chance to contest the validity of the award, the High Court can interfere, although it was within the competence of the court below to decide that the award was a valid one. For the reasons given above we see no ground for limiting our authority to interfere with the judgment to a case in which a question of jurisdiction has arisen.

Now, coming to the merits of the case, we find that the learned Munsif did not exercise his authority, which he was bound to exercise in view of section 153 of the Code of Civil Procedure. Sections 151, 152 and 153 are very salutary provisions of law and are meant to invest the courts with authority to see that the object for which courts exist is carried out and that the merest technicality may not be allowed to stand in the way of substantial justice. We can in this connection also refer to section 99 of the Code of Civil Procedure as having been framed with the same object

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in view. It is a matter of history now that there was a time when suits were dismissed and plaints were rejected because the plaints were not properly verified. Section 153 says not only that the court may at any time amend any defect or error in any proceeding in a suit, but it further emphasises the duty of the court by saying that "all necessary amendments *shall be made* for the purpose of determining the real question or issue raised by or depending on such proceeding." Can we say in this case, that the learned Munsif has used his powers conferred upon him by section 153 by seeing that all necessary amendments have been carried out, so that the real controversy between the parties may be determined?

There can be no doubt that order XXXIII, rule 5 empowers a court to reject an application for permission to sue as a pauper if it is not properly framed as directed therein; but this can only mean that no amendments were possible and the defects could not be rectified for some reason or other. In our opinion it was the duty of the court when it found that a defect in verification was there, to offer a chance to the applicant to correct the verification. If that chance was not availed of, it was certainly open to the court to reject the application. We do not agree that the remedy by instituting a second application for permission to sue as a pauper was the right and proper remedy in such a case. The rule of limitation may stand in the way of the second application. Then what about the unnecessary costs to be incurred by the parties in going over the same procedure which had been already gone through?

Section 151 of the Code of Civil Procedure says: "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." Will it not be an abuse of the process of the court if

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the applicant is called upon to make a fresh application for permission to sue as a pauper simply because his first application was badly verified?

We want to lay emphasis on the feature that our decision has not been arrived at simply because we consider that these are hard cases but because we consider that the object for which the courts exist, namely, doing justice, has not been kept in view by the orders in question.

In the result, we allow the applications, set aside the orders complained of and remand the cases to the court below and direct it to give the applicant a sufficient opportunity to enable him to correct the verification of his petitions. After the petitions have been verified the court will proceed to decide the petitions on their merits.

APPELLATE CIVIL

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kisch.

AMBA LAL (OBJECTOR) *v.* RAMGOPAL MADHOPRASAD (DECREE-HOLDER)*

1932 *December*, 5.

Civil Procedure Code, sections 144 *and* 151—*Restitution—Sale in execution of simple money decree—Decree-holder purchaser—Rateable distribution amongst several decree-holders —Judgment-debtor's title subsequently found invalid as the result of a separate suit—Application by decree-holder purchaser for restitution of amounts rateably distributed—Inherent power to order restitution*—Caveat emptor, *doctrine of—Duty of courts to prevent injury by act of court.*

In execution of a simple money decree the judgment-debtors' shares in certain joint family properties were sold by auction, the decree-holder being the purchaser. At that time a decree for partition among the judgment-debtors' family, which had allotted most of these properties as the separate shares of other members of the family, was in existence and on its basis objections under section 47 of the Civil Procedure Code were raised and a suit was filed by these other members, but the

* First Appeal No. 390 of 1929, from a decree of S. Nawab Hasan, Additional Subordinate Judge of Aligarh, dated the 8th of August, 1928.

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objections and the suit were dismissed on the finding that the partition was fraudulent and collusive. After the sale the decree-holder purchaser had to pay out a part of the sale price to other decree-holders who were entitled to a rateable distribution. Subsequently the objections and the suit aforementioned were allowed on appeal, on the finding that the partition was valid, with the result that most of the properties already sold were exempted from the operation of the sale. The decree-holder auction purchaser then applied for restitution of a corresponding portion of the money which had been paid out in rateable distribution to the other decree-holders.

Held that, without deciding the question whether section 144 of the Civil Procedure Code applies only to those cases in which a decree is reversed or varied on appeal or revision and not to cases in which a decree is varied or set aside as the result of separate proceedings initiated for the purpose, or the question whether relief cannot be granted under that section in the cases of variations and reversals of orders as distinguished from decrees, it is clear that the court had power to grant the restitution in exercise of its inherent powers under section 151.

Section 144 does not exhaustively deal with the powers of courts to grant restitution, and the jurisdiction of a court to grant restitution in appropriate cases is not confined only to cases coming within the purview of that section but is inherent in the general jurisdiction of the court to pass an order for restitution, independently of the provisions of that section, with a view to secure complete justice between the parties concerned.

In the present case justice dictated that the restitution should be granted. At the time of the sale it was honestly believed by everybody that the properties sold belonged to the judgment-debtors, but subsequently events showed that they had no saleable interest in some of the properties, with the result that the original fund, viz. the price fetched at the auction sale, that was rateably distributed between the several decree-holders was reduced in proportion to the value of these properties. This had the effect of reducing the amount to which each rival decree-holder was entitled on rateable distribution and the loss must, in the absence of any statutory provision to the contrary, be borne proportionately by all the decree-holders.

The doctrine of *caveat emptor* as applied to court sales discussed.

In the present case, having regard to the fact that the auction purchaser was the decree-holder himself, as well as to other circumstances, the doctrine of *caveat emptor* did not stand in the way of the restitution.

Further, the restitution was dictated by the duty cast upon courts to see that no act of the court does an injury to a suitor. Before the auction sale the question whether the judgment-debtors had any shares in the properties sought to be sold had actually been litigated and decided by the court and it was on the faith of that decision that the decree-holder made the auction purchase.

Messrs. *P. L. Banerji* and *S. B. L. Gaur*, for the appellant.

Mr. *Panna Lal*, for the respondent.

IQBAL AHMAD and KISCH, JJ. :—This appeal and the connected appeal No. 410 of 1929 are directed against an order for restitution passed by the court below under section 144 of the Code of Civil Procedure under the following circumstances. Firm Ram Gopal Madho Prasad, hereinafter referred to as the respondent, obtained a simple money decree from the High Court of Bombay against three brothers named Mani Shankar, Mohan Shankar and Suraj Shankar, who are hereinafter referred to as the judgment-debtors. The respondent had also impleaded three younger brothers of the judgment-debtors named Harendra Shankar, Mahendra Shankar and Gajendra Shankar as defendants to the suit in which the decree was passed, but the suit against them was dismissed. Before the said decree was passed Harendra Shankar, Mahendra Shankar and Gajendra Shankar had brought a suit for partition against the judgment-debtors and their mother Mst. Mani Kunwar and on the 28th of March, 1919, a decree for partition was passed. Mst. Mani Kunwar, the mother, and the six brothers were held entitled to a one-seventh share each and by the decree separate properties were allotted to the three brothers who were plaintiffs in the partition

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suit and to the judgment-debtors and to their mother, Mst. Mani Kunwar.

The respondent got his decree transferred to the Subordinate Judge's court, Aligarh, and on the 30th of April, 1923, applied for execution of the same by attachment and sale of the alleged three-seventh share of the judgment-debtors in various items of properties. Some of the properties so attached had been wholly allotted to Harendra Shankar and others, the plaintiffs in the partition suit, by the decree in that suit and some had been allotted to Mani Kunwar. To this application for execution Harendra Shankar, Mahendra Shankar and Gajendra Shankar preferred objections under section 47 of the Code of Civil Procedure and they contended that the judgment-debtors had no share in the properties that were allotted to them by the decree in the partition suit and that those properties were not liable to attachment and sale in execution of the decree held by the respondent. Mst. Mani Kunwar filed a regular suit on the same allegations against the decree-holder. On the 16th of April, 1925, both the objections and the suit were dismissed on the finding that the partition was collusive and fraudulent, and that the decree-holder was entitled to sell three-seventh share of the judgment-debtors in all the properties. Harendra Shankar and others, the objectors, and Mst. Mani Kunwar preferred appeals in the High Court and those appeals were allowed on the 30th of January, 1928, and the partition was held valid and binding.

In the meantime the alleged three-seventh share of the judgment-debtors in all the properties attached by the respondent was sold by auction and purchased by the respondent for Rs.31,290.

The appellant in the present appeal and the appellant in the connected appeal and certain other persons also held decrees against the judgment-debtors, and they applied for rateable distribution and, after confirmation of the

sale mentioned above, obtained an order for rateable distribution of Rs.4,279-12-9 amongst them. The decree-holder deposited the above amount in court which was rateably distributed between the appellants in the two appeals and the other decree-holders.

In consequence of the appeals mentioned above being allowed by the High Court the properties allotted to the objectors and to Mst. Mani Kunwar were exempted from the operation of the sale, with the result that the alleged three-seventh share of the judgment-debtors in those properties purchased by the decree-holder at the auction sale was exempted from the operation of sale. The decree-holder then filed an application under sections 144 and 151 of the Code of Civil Procedure alleging that as most of the properties had been released from the sale in consequence of the decrees of the High Court, the amount that could be rateably distributed between the other decree-holders was much less than the sum of Rs.4,279-12-9, and as the appellant in the present appeal and the appellant in the connected appeal and the other decree-holders had received, on rateable distribution, a sum in excess of the amount to which they were entitled, they were bound to refund the same to him.

This application was opposed by the appellant and other decree-holders mainly on the ground that sections 144 and 151 of the Code of Civil Procedure had no application to the case and that the respondent was not entitled to call upon those decree-holders to refund any portion of the amount that they had received on rateable distribution. This contention was overruled by the court below and an order for restitution was passed. That order is challenged in the present appeal.

It would appear from the facts stated above that the sale of three-seventh share in the properties that were allotted by the partition decree to the plaintiffs of that suit and to Mst. Mani Kunwar fell through, not in

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consequence of the reversal or variation in any respect of the simple money decree held by the respondent in execution of which the sale was held, but as a result of the decrees of the High Court that were passed in totally separate proceedings initiated for the purpose of having it declared that the judgment-debtors had no share in those properties. It has been held in a number of cases that section 144 is confined in its operation to cases in which a decree is varied or reversed on appeal or revision and does not apply to cases in which a decree is held to be wholly or partially null and void as the result of a decree in a suit other than the one in which the decree declared to be null and void was passed; vide *Tara Chand* v. *Champi* (1), and *Ashutosh Nandi* v. *Kundal Kamini Dasi* (2). In the Full Bench decision of this Court in *Bindeshri Prasad Tiwari* v. *Badal Singh* (3) it was observed that "The words 'varied or reversed' used in section 144 seem more applicable to a proceeding by way of appeal, revision or review than to a separate suit declaring that a decree is not binding on a particular party", but the question was not decided by the Full Bench. On the authority of these cases it is argued on behalf of the appellant that the court below was wrong in granting restitution under section 144 of the Code of Civil Procedure.

It is further pointed out that as the order confirming the sale was partially nullified by the decrees passed by the High Court and as that order was not a decree, no redress could be given to the decree-holder by ordering restitution under section 144 as that section has reference only to cases in which a decree, as distinguished from an order, is varied or reversed and not to cases in which an order which is not a decree is varied or set aside. In support of this contention reliance is placed on *Jagdip Narain Singh* v. *F. H. Holloway* (4) and *Sukhdeo Dass* v. *Rito Singh* (5).

(1) (1924) I.L.R., 46 All., 767.
(2) A.I.R., 1929 Cal., 814.
(3) (1923) I.L.R., 45 All., 369.
(4) (1917) 39 Indian Cases, 653.
(5) (1917) 39 Indian Cases, 763.

The questions, whether section 144 applies only to those cases in which a decree is reversed or varied on appeal and not to cases in which a decree is varied or set aside as the result of separate proceedings initiated for the purpose, and whether relief cannot be granted under that section in the cases of variations or reversals of orders as distinguished from decrees, are beset with difficulties of varying intensity, and as we have arrived at the conclusion, for reasons to be presently stated, that it was open to the court below to grant restitution in exercise of its inherent power under section 151 of the Code, we refrain from expressing any opinion on those questions.

We find that in cases almost similar to the case before us courts have granted relief to an aggrieved party under section 151 of the Code of Civil Procedure. In the Full Bench decision in *Bindeshri Prasad Tiwari* v. *Badal Singh* (1) it was observed that "Even if we were not so satisfied, we should have been prepared to grant the relief asked for, on the analogy of section 144, in exercise of our inherent power under section 151 of the Code." We are aware of the fact that in the case decided by the Full Bench the decree in execution of which the sale was held was itself vacated as the result of a separate suit, and we have quoted the observation made above simply to show that it is open to courts to grant restitution in cases not coming within the purview of section 144 on the analogy of the provisions of that section by exercising the inherent powers of courts defined by section 151 of the Code. In *Tara Chand* v. *Champi* (2) this Court while holding that section 144 did not apply observed that "It is clear that this Court has jurisdiction, under the provisions of section 151, to exercise its discretion and make such order as may be necessary for the ends of justice." In *Jai Barham* v. *Kedar Nath Marwari* (3) it was observed by their Lordships of the Privy Council

(1) (1923) I.L.R., 45 All., 369. (2) (1924) I.L.R., 46 All., 767.
(3) (1922) 21 A.L.J., 490.

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that "It is the duty of the court under section 144 of the Code of Civil Procedure to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the court to act rightly and fairly, according to the circumstances, towards all parties involved." Similarly in the case of *Rai Charan Bhuiya* v. *Debi Prosad Bhakat* (1) it was held that, though the remedy afforded by section 144 may not be available to an aggrieved party, the court has wide powers under section 151 of the Code of Civil Procedure to pass an order for restitution with a view to do complete justice between the parties and to restore them to the *status quo ante*.

It is manifest from these cases that the jurisdiction of a court to grant restitution in appropriate cases is not confined only to cases coming within the purview of section 144 of the Code and that it is inherent in the general jurisdiction of the court to pass an order for restitution independently of the provisions of section 144, with a view to secure complete justice between the parties concerned. Section 144 only defines the power of a court to make an order for restitution in a particular class of cases and we can discover no justification for holding that that section exhaustively deals with the powers of courts to grant restitution and that an aggrieved party is not entitled to a relief by way of restitution independently of the provisions of that section. We hold, therefore, that it is not only permissible, but is imperative, to grant restitution by exercising the inherent powers vested in courts as defined by section 151 of the Code, provided the exercise of those powers is necessary for the purpose of preventing injustice and does not contravene any statutory provision.

In the case before us we are satisfied that justice dictates that the order for restitution passed by the court

(1) A.I.R., 1922 Cal., 28.

below be upheld. Both the appellant and the respondent held decrees against the judgment-debtors. The appellant as a rival decree-holder shared with the respondent in the proceeds of the sale of the properties that were, at the time of the sale, honestly believed by everybody to belong to the judgment-debtors. But it became clear from the events that subsequently happened that the judgment-debtors had no saleable interest in some of the properties sold, with the result that the original fund, viz., the price fetched at the auction sale, that was rateably distributed between the appellant and the respondent was reduced in proportion to the value of the properties that were held not to belong to the judgment-debtors. This obviously had the effect of reducing the amount to which each rival decree-holder was entitled on rateable distribution and the loss must, in the absence of any statutory provision to the contrary, be borne proportionately by all the decree-holders. All the decree-holders had to look to a common fund for the satisfaction of their decrees and that common fund having been reduced, the proportionate amount payable to each must undergo a proportionate reduction, and if any decree-holder has realised more than his legitimate share he must pay back the same to the other decree-holder who has received less. All the decree-holders were in the same position and were sailing in the same boat. They must sink or swim together and it is not open to one of the decree-holders to say to the other that he is entitled to ignore the effect of the decrees of the High Court and that the loss consequent on those decrees must be borne by the other decree-holder.

But it is argued by the learned counsel for the appellant that by ordering restitution in the present case we shall be wholly ignoring the well settled rule that the doctrine of *caveat emptor* applies to court sales and that there is no warranty of title at such sales. It is pointed out in this connection that if the properties that were

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exempted from the operation of sale in consequence of the decrees passed by the High Court had been purchased by a stranger and not by the decree-holder, that stranger auction purchaser would not have been entitled to a refund of any portion of the purchase money paid by him, and it is maintained that the mere fact that in the present case the decree-holder himself was the auction purchaser is no justification to put him on a preferential basis and to pass an order that would indirectly have the effect of giving a go-by to the rule of law mentioned above. In support of these contentions our attention is drawn to *Deputy Shankar* v. *Mangal Sen* (1) and to *Anand Krishna* v. *Kishan Devi* (2). In *Deputy Shankar's* case it was held by this Court that if the property purchased at an auction sale is lost by the purchaser in consequence of a decree passed in a suit brought by a third party for a declaration that he and not the judgment-debtor was the owner of the same, the purchaser is not entitled to bring a suit for recovery of purchase money as against the decree-holder. In that case the purchaser was a person other than the decree-holder and it was held that the only remedy of such a purchaser for the return of the purchase money is that provided for by order XXI, rule 91, and order XXI, rule 93 of the Code of Civil Procedure. The decision proceeded on the principle that there is no warranty of title at court sales.

We are not unaware of the fact that the rule that the doctrine of *caveat emptor* applies to court sales has been laid down in a series of cases, but we may point out that the application of that doctrine has undoubtedly the effect of negation of justice in many cases. It is true that there is no warranty of title at court sales and that what is sold is merely the right and interest of the judgment-debtor, but if it is found that the judgment-debtor had no saleable interest in the property sold we can discover no equitable principle to justify the retention by

(1) (1932) I.L.R., 54 All., 948. (2) (1930) I.L.R., 53 All., 496.

the decree-holder of the price paid by the auction purchaser in the event of the property purchased by him being lost to him. It is no doubt too late in the day to question the rule, but, for the reasons given above, we are inclined to the view that the rule must be confined within the strictest possible limits and should not be extended a step further than the limits imposed by decisions that are binding upon us.

In the present case the auction purchaser was not a third person but the decree-holder himself. On the one hand the argument is available to the appellant that on principle there is no distinction between a case where a third person is the auction purchaser and a case where the decree-holder himself makes the purchase, so far as the right to a refund of the purchase money in consequence of the sale being vacated is concerned. But, on the other hand, it has to be borne in mind that in the event of an auction purchase made by the decree-holder himself being set aside, the decree-holder is entitled, as against the judgment-debtor, to say that notwithstanding the auction purchase made by him his decree for the full amount stands intact, as the purchase made by him has been vacated. A question of this description, when raised by the decree-holder, would obviously come within the purview of section 47 of the Code of Civil Procedure, and in order to judge of the validity or otherwise of such a contention of the decree-holder the court will have to consider the question whether or not the decree has been wholly or partially satisfied. In considering this question the court cannot, in our judgment, ignore the fact that by the infructuous auction purchase the decree-holder got nothing, and that his decree has not been satisfied to any extent. The position that simply because of the doctrine that there is no warranty of title at court sales the court is bound to hold that the decree of the decree-holder has been satisfied to the extent of the amount for which he purchased the property which was

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afterwards held not to belong to the judgment-debtor, seems wholly illogical to us. The simple question in such a case would be, "Has the decree been satisfied to any extent?" and we are unable to appreciate how a court can ignore the fact that in consequence of the sale made by the decree-holder being set aside the decree-holder got nothing. For these reasons we are unable to extend the rule mentioned above to cases in which the decree-holder is the auction purchaser himself and the sale is found to be a nullity consequence of the decree in another suit declaring that the property sold did not belong to the judgment-debtor.

The view that we take is not in consonance with the decision of this Court in *Anand Krishna's* case (1). In that case the auction purchase was made by the decree-holder herself and the sale was in due course confirmed. The decree-holder, however, lost half of the property purchased by her as the result of a decree in a suit brought by a third person declaring that half of the property belonged to that third person and not to the judgment-debtor. This Court held that in such a case there was no "equity in favour of the decree-holder by which it may be said that she is entitled to recover one-half of the price paid by her because she lost one-half of the property attached and sold." It was pointed out by the learned Judges that when the attachment was made by the decree-holder the judgment-debtors never asserted that they had title to the whole of the property attached, nor did they demand any particular price for the same, and that it was quite possible that the property was worth much more than the sum for which it was purchased by the decree-holder and, therefore, it may very well be that even one-half of the property that remained with the decree-holder auction purchaser was worth more than the price paid by him.

We confess with respect that the reasons mentioned above do not appear to us to justify the conclusion that

(1) (1930) I.L.R., 53 All., 496.

there was no equity in favour of the decree-holder auction purchaser in the case. In the first place, in the absence of proof to the contrary the presumption must be that the price fetched at a court sale, where any and every person is entitled to bid, is adequate, and no proof to the contrary appears to have been adduced in that case. In the absence of such proof, we are unable to discover why the decree-holder should not be permitted to say that in the consideration of the question as to what extent his decree has been satisfied the court must look to the substance of the matter and must, in so doing, take note of the fact that the sale of half of the property purchased by him has been set aside. If, in any particular case, the property that remained with the decree-holder is worth approximately as much as the price paid by him, we agree that there would be no equity in favour of the decree-holder. But in the absence of evidence as to the value of the property remaining with the decree-holder, we are unable to accept as a general proposition that there is no equity in favour of a decree-holder auction purchaser in such a case.

In the case before us it was not the case of either party that the auction purchase was made by the decree-holder at an inadequate price and therefore his decree remained unsatisfied to the extent of value of the properties, the sale of which fell through in consequence of the decrees passed by the High Court. It follows, therefore, that the purchase price of the properties that were exempted from the operation of the sale was not available for rateable distribution between the decree-holder and the appellants of this and the connected appeal and other decree-holders. The property had originally been purchased by the decree-holder for a sum of Rs.21,290, and the result of the decrees of the High Court was that properties worth Rs.2,540-1-2 remained with the decree-holder, and, therefore, it would obviously be inequitable to distribute rateably the sum of Rs.21,290 instead of Rs.2,540-1-2 between the various decree-holders.

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For the reasons given above, the arguments advanced by the learned counsel for the appellant, in bar of the exercise of the inherent powers vested in courts to prevent injustice, do not commend themselves to us and we are unable to accept the same.

We may further point out that there is another consideration that weighs with us in upholding the order for restitution passed by the court below. Before the auction sale the question, whether the judgment-debtors had any shares in the properties allotted by the decree in the partition suit to Harendra Shankar and others and to Mani Kunwar, had actually been litigated and decided by the court below and it was on the faith of that decision that the decree-holder made the auction purchase. It is true that that decision had been appealed against in this Court, but nevertheless the decree-holder was entitled to assume, at the time of the sale, that a court of competent jurisdiction had held that the judgment-debtors had three-sevenths share in all the properties put to sale. Now, to deny to the decree-holder the relief that has been granted to him by the court below would in effect be to disregard the duties cast upon courts to see that no act of the court does an injury to a suitor. As was pointed out by their Lordships of the Privy Council in *Jai Barham* v. *Kedar Nath Marwari* (1), "One of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and when the expression 'the act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case."

It was also argued by the learned counsel for the appellant that the order for restitution would result in great injustice to the appellant as the decree held by him has

(1) (1922) 21 A.L.J., 490.

become time barred. The suggestion that the decrees held by the appellants either in the present appeal or in the connected appeal have become time barred has not been substantiated and we have not, therefore, allowed that suggestion to influence our decision.

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It is not disputed that the figures worked out by the court below are correct. The result, therefore, is that we affirm the decision of the court below and dismiss this appeal with costs.

Before Mr. Justice Niamat-ullah and Mr. Justice Kisch

RAM CHARAN (DECREE-HOLDER) *v.* PARMESHWARI DIN (JUDGMENT-DEBTOR) *

1932 *December*, 8.

Civil Procedure Code, section 47; *order XXI, rule* 97—*Transfer of Property Act (IV of* 1882), *section* 52—Pendente lite *transfer by mortgagor—Final decree for foreclosure—Decree executed against mortgagor for possession—Decree can be executed again against the transferee* pendente lite.

During the pendency of a suit for foreclosure the mortgagor defendant made a usufructuary mortgage to a stranger and then sold to him the equity of redemption. Subsequent to this the plaintiff applied for a final decree, impleading the transferee but later on discharging him. In execution of the final decree the plaintiff obtained delivery of possession against the mortgagor. Failing, however, in the mutation proceedings to get his name entered in place of that of the transferee, the plaintiff applied to execute his decree again, praying for delivery of possession as against the transferee.

Held that the rights of the decree-holder, namely to extinguish the right of redemption and to obtain possession of the mortgaged property, could not be affected by the transfers *pendente lite* and he was entitled to execute the final decree not only against the mortgagor but equally as against the transferee *pendente lite*. The execution taken out against the mortgagor turned out to be infructuous and was not a complete execution of the decree; so the decree-holder was entitled to maintain a second application for execution against

* First Appeal No. 462 of 1931, from a decree of Priya Charan Agarwal, Subordinate Judge of Cawnpore, dated the 30th of June, 1931.

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the transferee and was not bound to come, nor did he profess to come, with an application under order XXI, rule 97 of the Civil Procedure Code. *Held*, also, that the controversy being between the decree-holder and a representative of the judgment-debtor, and being one relating to the execution of the decree, the matter was to be decided not by a separate suit but by the execution court under section 47 of the Civil Procedure Code.

Dr. *K. N. Katju* and Mr. *Bankey Behari*, for the appellant.

Messrs. *P. L. Banerji*, and *Basudeva Mukerji*, for the respondent.

NIAMAT-ULLAH and KISCH, JJ. :—This is a decree-holder's appeal and arises in the following circumstances. The appellant was a mortgagee under a deed executed by one Nurul Hasan and instituted a suit in 1923 for the enforcement of his mortgage by foreclosure, and obtained a preliminary decree *ex parte*. Subsequently the *ex parte* decree was set aside and after contest another preliminary decree for foreclosure was passed on the 30th of September, 1924. During the pendency of the foreclosure suit Nurul Hasan executed a deed of usufructuary mortgage in favour of the respondent, Parmeshwari Din, on the 15th of February, 1924. Subsequently, on the 25th of February, 1928, Parmeshwari Din purchased Nurul Hasan's equity of redemption in execution of a simple money decree. The appellant made his application for final decree some time after the 25th of February, 1928, mentioning Parmeshwari Din as one of the opposite parties in the heading of his application. On the 28th of July, 1928, when the application was heard, he discharged Parmeshwari Din, and the court recorded an order to that effect. A final decree for foreclosure was passed on the same day. The decree-holder obtained delivery of possession against Nurul Hasan on the 29th of March, 1929, in execution of his decree. In the mutation proceedings which followed, disputes

arose between the appellant and Parmeshwari Din, who had obtained entry of his name in the record of rights. Apparently, the decree-holder was unsuccessful in having the name of Parmeshwari Din expunged. Thereupon, he made a second application for execution of decree on the 21st of August, 1930, praying that delivery of possession be made as against Parmeshwari Din, who is bound by the final decree passed against Nurul Hasan, he being a transferee *pendente lite*. Parmeshwari Din objected to any proceedings in execution being taken against him. His principal pleas were that as he was no party to the foreclosure decree, no execution could be taken out against him, and that the decree having been once executed, a second execution was not permissible. It was also contended that an application of the kind made by the appellant was not maintainable and that his only remedy was to institute a regular suit. This last mentioned plea found favour with the lower court. Accordingly, the appellant's application was dismissed, and he was directed to seek his remedy by a regular suit.

The learned advocate for the appellant argued that Parmeshwari Din, having taken a mortgage and having purchased the equity of redemption of Nurul Hasan during the pendency of the foreclosure suit, was bound by the decree which was eventually passed against his transferor Nurul Hasan, and that the transfers in his favour cannot affect the appellant's rights under the decree to any extent.

We are clearly of opinion that this contention is sound. Section 52 of the Transfer of Property Act lays down that during the active prosecution in any court of a contentious suit in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein, except

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under the authority of the court and on such terms as it may impose. It is not suggested that permission of the court was obtained for either of the two transfers in favour of Parmeshwari Din. It cannot be doubted that the foreclosure suit was a contentious one. It is equally undeniable that the mortgaged property was directly and specifically in question in the foreclosure suit. It is clear that the transfers taken by Parmeshwari Din cannot in any manner affect the rights of the decree-holder, the appellant before us. One of his rights under the decree in the foreclosure suit was to extinguish Nurul Hasan's right of redemption and to obtain actual possession of the mortgaged property. If Parmeshwari Din's objection as regards the appellant's right to take possession in execution of his decree be allowed to prevail, his (the decree-holder's) rights under the foreclosure decree would be materially affected. In this view the appellant was entitled to execute his decree not only against Nurul Hasan but also his transferee *pendente lite*, Parmeshwari Din.

A number of technical objections have been raised before us. First, it is contended that section 47 of the Code of Civil Procedure does not apply, and consequently the order of the lower court cannot be the subject of an appeal to this Court. In our opinion this contention has no force. That Parmeshwari Din is a representative in interest of Nurul Hasan can admit of no doubt. The question arises between the decree-holder on the one side and the representative of the judgment-debtor on the other. The controversy between the parties is clearly one relating to the execution of decree. In fact the appellant's application for execution of decree was resisted by the respondent. We think that section 47 of the Code of Civil Procedure is fully applicable and that an appeal to this Court is competent.

It was argued that the respondent, though a transferee *pendente lite*, had a right of redemption by virtue

of transfers made in his favour, though *pendente lite*, and that he should not have been discharged after being impleaded in the application for a final decree. Reference is made to order XXXIV, rule 3 of the Code of Civil Procedure. We think that order XXXIV, rule 3 of the Civil Procedure Code should not be read independently of other provisions of the law. When read with section 52 of the Transfer of Property Act, there can be no doubt that a final decree passed against Nurul Hasan is as effective against his transferee *pendente lite* as against himself. The transferee could have redeemed even though he was no party. He did not avail himself of the opportunity and the final decree extinguished not only the rights of Nurul Hasan, but also the rights of his transferee *pendente lite*.

It is next argued that the appellant having taken out execution of his decree against Nurul Hasan and having obtained delivery of possession against him, the decree should be deemed to have been completely executed, and no further execution proceedings can take place. The appellant's application is said to be virtually one under order XXI, rule 97 of the Code of Civil Procedure, that is, an application by a decree-holder who is obstructed in taking possession of the property in respect of which a warrant for delivery of possession has been executed. We do not think this argument is sound. The decree has not been fully and effectively executed. There can be no doubt that the decree-holder could have, in the first instance, applied for execution not only against Nurul Hasan but also against his transferee *pendente lite*. Had he done so, there could be no argument against the maintainability of such application so far as Parmeshwari Din was concerned. The position cannot be materially different if an application was made in the first instance only against Nurul Hasan; and when the decree-holder subsequently discovered that the execution taken out against Nurul Hasan was infructuous, he applied for

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execution of his decree under order XXI, rule 11 of the Code of Civil Procedure against the respondent, who should as much be considered to be the judgment-debtor as Nurul Hasan himself. We are clearly of opinion that the execution taken out against Nurul Hasan was not a complete execution of the decree. Reference was made to two Full Bench cases, *Bhagwati* v. *Banwari Lal* (1), and *Gaya Bakhsh Singh* v. *Kuar Rajendra Bahadur* (2). Both these cases refer to the right of an auction purchaser to apply for delivery of possession after he was actually delivered possession but was obstructed by a judgment-debtor or his representative. It was held in both those cases that the auction purchaser's application was one under section 318 of the Code of Civil Procedure of 1882, or order XXI, rule 97 of the Code of 1908. The position of an auction purchaser is different from that of a decree-holder. The former is not the holder of a decree capable of execution but is merely entitled to delivery of possession under order XXI, rule 95, on the strength of his sale certificate. The decree-holder on the other hand is entitled to execute his decree, that is, he can secure all the advantages which the decree confers upon him. In this case the decree-holder is entitled to recover possession from the transferee. As we have already pointed out, the appellant's application is an application drawn up under order XXI, rule 11 of the Code of Civil Procedure and is not an application under order XXI, rule 97. His application for execution is within limitation, and there is no reason why it should be treated as an application under order XXI, rule 97. We hold that neither of the two cases referred to above has any application and that the appellant was entitled to maintain a second application for execution against Parmeshwari Din.

In the view of the case we have taken, this appeal succeeds. It is accordingly allowed. The order of the

(1) (1908) I.L.R., 31 All., 82. (2) (1927) I.L.R., 3 Luck., 182.

lower court is set aside. It shall deliver possession to the appellant as against the respondent, as prayed for in his application for execution. The appellant shall have his costs in both courts.

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REVISIONAL CIVIL

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Thom

MADHO PRASAD VYAS (CREDITOR) *v.* MADHO PRASAD (OFFICIAL RECEIVER) *

1932 *December*, 9

Provincial Insolvency Act (V of 1920), sections 27, 43, 75—Time specified within which to apply for discharge—Power to extend time even after expiry thereof—Revision of order under Provincial Insolvency Act.

Where an order of adjudication under the Provincial Insolvency Act has been made and a time has been fixed within which the insolvent has to apply for his discharge, the court has power to extend the time even after the expiry of the period originally fixed.

Where an appellate order passed in insolvency proceedings was sought to be revised under section 115 of the Civil Procedure Code, it was *held* that the proper section under which to entertain the petition was section 75 of the Provincial Insolvency Act.

Mr. *N. Upadhiya*, for the applicant.

Mr. *Gadadhar Prasad*, for the opposite party.

MUKERJI, A. C. J., and THOM, J.:—This is an application which purports to have been made under section 115 of the Code of Civil Procedure. It arises out of insolvency proceedings and therefore we think that the proper section under which to entertain this petition is section 75 of the Insolvency Act, and we accordingly do so.

It appears that a firm, Murlidhar Mangilal, was actually declared insolvent on the 30th of May, 1929, and two years' time was allowed by the order to apply

* Civil Revision No. 376 of 1932.

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for a discharge. The insolvents made an application for a discharge on the 2nd of July, 1931, and two days later the receiver supported the application by his petition dated the 4th of July, 1931. The court extended the time for applying for a discharge. The creditor whose application we have got before us appealed to the District Judge and he upheld the order appealed against.

Before us it is contended that it was not open to the insolvency court to extend the time for discharge after the expiry of the time originally fixed, inasmuch as no application had been made previously to the expiry of that period.

The application was made under section 43 of the Insolvency Act which says that, in case no application is made within the period specified by the court, the order of adjudication shall be annulled. Section 27 of the Insolvency Act lays down that the court is entitled, on sufficient cause being shown, to extend the period within which a debtor shall apply for his discharge. It is a rule of interpretation of statutes that we cannot read two different portions of the same statute in a manner so as to make one provision contradict the other. In this view we must hold that the court has power to grant further time to a judgment-debtor to apply for discharge.

In cases where the court is empowered to grant further time it has been held that this power implies within it a power to grant an extension even after the expiry of the time originally granted. This view was taken by their Lordships of the Privy Council in *Badri Narain* v. *Sheo Koer* (1). It is true that this ruling was given under the Code of Civil Procedure of 1882, but the principle is the same. In our view, therefore, it was open to the insolvency court to extend the time

(1) (1889) I.L.R., 17 Cal., 512.

for applying for a discharge even after the expiry of the period originally fixed.

If the annulment of the adjudication be not automatic, then the court must always have power to extend time even after the expiry of the original period. In this Court two learned Judges have held in *Maharaj Hari Ram* v. *Sri Krishan Ram* (1) that there is no automatic annulment of an adjudication. If this view be correct then the power of the court to extend time after the expiry of the original period does exist.

The view which we are taking is amply supported by authorities of other courts, namely *Abraham* v. *Sookias* (2), *Gopal Ram* v. *Magni Ram* (3) and *Palani Goundan* v. *Official Receiver of Coimbatore* (4). We see no reason to go against so many authorities with which we, with all respect, agree. The result is that the application fails on the merits and is hereby dismissed with costs.

MATRIMONIAL JURISDICTION

Before Mr. Justice Young

GOODAL (PETITIONER) *v.* GOODAL (RESPONDENT).* 1932 *December*, 15

Divorce Act (IV of 1869), section 7—Age of consent—Marriage of girl of 13—Validity—Divorce Act (IV of 1869), sections 3(5), 45, 49—"Minor"—Age of majority—Petition for divorce by girl of 19—Whether next friend necessary.

A marriage among Anglo-Indians domiciled in India took place in October, 1926, the bride being just 13 years old. On the question whether the girl was capable of giving a valid consent to her marriage it was *held* that for a Christian marriage in India the age of consent at the date of this marriage would be 12 for the girl, that being the then state of the law in England. There was nothing either in the Indian Divorce Act or the Christian Marriage Act as regards the age of consent; and under section 7 of the Indian Divorce Act the Indian High Courts had to act, subject to the

* Matrimonial Suit No. 8 of 1932.

(1) (1926) I.L.R., 49 All., 201. (2) (1923) I.L.R., 51 Cal., 337.
(3) (1927) I.L.R., 7 Pat., 375. (4) (1929) I.L.R., 53 Mad., 288.

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provisions of that Act, according to the principles and rules on which the Divorce Court in England for the time being acted.

A petition for divorce was filed by the wife, an Anglo-Indian domiciled in India and of 19 years of age. On the question whether under section 49 of the Divorce Act the petitioner was a minor and the petition had to be filed through a next friend, it was *held* that having regard to sections 3 (5) and 45 of the Divorce Act and to the fact that under the Civil Procedure Code a next friend was not necessary for a suitor of over 18 years of age, the petitioner was not a minor within the meaning of section 49 and a next friend was not required.

Messrs. *O. M. Chiene* and *Krishna Murari Lal*, for the petitioner.

Mr. *Hari Pal Varshni*, for the respondent.

YOUNG, J. :—This is the petition of Mrs. Beatrice Goodal against her husband, Havelock Charles David Goodal, for dissolution of her marriage to him on the ground of adultery, desertion and cruelty. No written statement has been filed. Counsel for the respondent says he is not in a position to put his client in the box. The petition is undefended. The parties are Anglo-Indians domiciled in India, and last resided together at Cawnpore. This Court therefore has jurisdiction to hear and decide this petition. The marriage took place at All Saints Cathedral, Allahabad, on the 2nd October, 1926. The petitioner was born on the 27th August, 1913. When this fact was brought to my attention on examining the pleadings I added an issue: "Was there a valid marriage; was the petitioner able to consent to the said marriage?" At the time of the marriage the petitioner was just 13 years old. The petitioner was married at this early age because the respondent seduced her under promise of marriage. The mother thought that it would be better under the circumstances to have the marriage celebrated. She gave the petitioner's age as sixteen.

There appears to be nothing either in the Indian Divorce Act or in the Indian Christian Marriage Act as regards the age of consent. Under section 7 of the

Indian Divorce Act the Indian High Courts have to act, subject to the provisions contained in that Act, according to the principles and rules on which the Court for divorce and matrimonial causes in England for the time being acts and gives relief. It appears to me therefore that for a Christian marriage in India the age of consent at the date of this marriage would be 12 in the case of a girl, that being the then state of the law in England at the date of this marriage. The answer to this issue is therefore that this marriage was a valid marriage and the petitioner consented to it.

[With regard to the other issues of adultery, desertion and cruelty the finding was that all of these were established.]

The wife is therefore entitled to a decree *nisi*.

Mr. *Haripal Varshni*, who appears here on behalf of the husband, has drawn my attention to section 49 of the Indian Divorce Act, which enacts that "where the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the court; and no petition presented by a minor under this Act shall be filed until the next friend has undertaken in writing to be answerable for costs." He contends that the petitioner being under 21 years of age is a minor within the meaning of this section, and that therefore the petition is bad as the petitioner is not suing through her next friend. Although no defence has been entered in this case and Mr. *Haripal Varshni* has really no *locus standi* in the Court, I have allowed him as *amicus curiae* to draw my attention to this. In my opinion there is nothing in the point. Under section 3(5) "minor children" other than those of "native" parents are defined as unmarried children who have not completed the age of 18 years. Although this does not apply strictly to the petitioner, who is married, it is a guide. In any event the Civil Procedure Code, by section 45 of the Divorce Act, applies to petitions under the Divorce Act. Under that Code a

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one from Patna, another from Madras, and a third from Calcutta, where it was held that in the case of an advocate or attorney being suspended from practice the High Court was not authorised to grant leave to appeal to His Majesty in Council. In the case decided by this Court recently, quoted above, it was pointed out that in three earlier cases leave had been granted by this Court, presumably under section 109 (*c*) of the Civil Procedure Code. In view of the fact that the practice of this Court has been consistent, we do not propose to depart from that practice, and we hold that leave may be granted under section 109 (*c*) of the Code of Civil Procedure. We may point out that if leave cannot be granted under that section of the Code of Civil Procedure, it may be granted under paragraph 30 of our Letters Patent.

As regards the merits, we have to declare, whether leave is to be granted under section 109 (*c*) of the Code of Civil Procedure or under paragraph 30 of the Letters Patent, that the case is a fit one for appeal.

The facts stated above make it abundantly clear that this matter should go before His Majesty in Council for the final word. In a similar case in which leave was granted, namely, *In the matter of an Advocate of Benares* (1), leave was granted, although the facts were not stated. One of us was a party to that case, and in our opinion this particular case before us is a much stronger case.

Several points have been taken in the proposed memorandum of appeal, and we are of opinion that each and every one of those points are capable of being argued with some force before His Majesty in Council. Beyond stating this we need not go further, because it is not for us to decide whether the order proposed to be appealed against is a correct order or not.

(1) [1932] A.L.J., 861.

The case is a fit one for appeal not only from the point of view of the applicant, but also from a general point of view.

The next point that remains to be considered is whether in the case of leave being granted, security should be taken at all, and, if taken, whether it should be Rs.4,000, and further whether security may be furnished in this particular case in immovable property.

Mr. *Malik* for the applicant has argued that in a case like this there is no provision for security being furnished. If the application is one under section 109 (*c*) of the Code of Civil Procedure security has to be furnished. If the application be one under paragraph 30 of the Letters Patent of our High Court, even then the leave will be subject to such rules as there may be in force for filing appeals in general before His Majesty in Council. These rules would be the rules which regulate the filing of appeals in ordinary civil cases. We decide, therefore, that security must be furnished.

Then comes the question of amount. Rule 1 (*b*), chapter XVII of the High Court Rules says that the security shall in ordinary cases amount to Rs.4,000. It further says that it may be increased to Rs.10,000. We take it, therefore, that the minimum amount to be furnished is Rs.4,000. Mr. *Malik* has argued that in cases like this it has never been the practice of the High Court to instruct counsel to oppose the appeal before His Majesty in Council. This may be so, but this Court cannot be bound by what has been done before, and if it chooses that the application should be opposed, the question of cost would appear to be important.

The next question is whether we should permit the applicant to furnish security in immovable property. The application is supported by an affidavit which states that the applicant was doing some business

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which he closed down in order to join the profession of law, that he joined the profession only in March, 1932, and it was on 1st April, 1932, that he uttered the words which have brought on him all this trouble. The affidavit further goes on to say that he has not got any cash or Government promissory notes, but he is in a position to furnish immovable property of sufficient value for security. We have heard the learned Government Advocate on the point and he leaves the matter, and very wisley too, in our hands. We think that this is a case in which an exception may be made, and the applicant may be permitted to furnish security in immovable property.

The result is that we allow the application and certify to His Majesty in Council that this is a fit case for an appeal before His Majesty. We direct that security be furnished within the time limited by the law in the amount of Rs.4,000, but it may be furnished in sufficient immovable property. The document shall be by way of a mortgage created in favour of the Registrar of the High Court, and it must be produced in Court within the time permitted by the law.

Before Mr. Justice Young

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*December, 16

LIAQAT HUSAIN *v.* OFFICIAL LIQUIDATOR *

Companies Act (VII of 1913), *sections* 235, 280—*Misfeasance summons—Security for costs of opposite party—Public policy.*

A misfeasance proceeding under section 235 of the Companies Act is merely an examination by the court into the conduct of an officer of the company, and as a result of that examination the court may order the officer to restore the money or the property of the company, as the court may think just. Such proceedings cannot be said in any way to be "a suit or other legal proceeding" within the meaning of section 280 of the Act.

* Application in Miscellaneous Case No. 369 of 1928.

So, where the official liquidator applied for misfeasance proceedings against one of the original directors, it was *held* that the director was not entitled to demand security for his costs to be furnished by the official liquidator.

Any rule that the liquidator should furnish security for costs in such proceedings would also be opposed to public policy, as it would render it impossible for him to apply for such proceedings by reason of want of funds caused by the fraudulent misappropriation of the very persons sought to be proceeded against.

Mr. *A. M. Khwaja*, for the applicant.

Mr. *Bhagwati Shankar*, for the opposite party.

YOUNG, J. :—This is an application under section 280 of the Indian Companies Act praying that the official liquidator of the U. P. Oil Mills Co., Ltd., in liquidation, should provide security for the applicant's costs. The applicant was one of the original directors of the company, and on the company going into liquidation was appointed voluntary liquidator. Subsequently a compulsory winding up order was passed by this Court, and an official liquidator was appointed. On an investigation of the company's books the official liquidator has thought proper to file a misfeasance summons under section 235 of the Indian Companies Act against the applicant. It is upon that application under section 235 that the applicant wishes the official liquidator to furnish security for his costs.

In my opinion there is nothing in this application. Section 280 of the Indian Companies Act reads as follows: "Where a limited company is plaintiff or petitioner in any suit or other legal proceeding, any court having jurisdiction in the matter may, if it thinks that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for his costs." Counsel for the applicant has referred me to an English case, *Pure Spirit Co.* v.

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Fowler (1), where it was held that the court was bound to order security for costs where the company is in liquidation and there is no evidence to rebut the presumption that the assets will be insufficient to pay the defendant's costs, if he succeeds. In my opinion, the case relied upon by the counsel for the applicant is no authority for the applicant's contention. That case was an action brought by one company against another company, the plaintiff company happening to be in liquidation. That authority cannot affect an application under section 235, which is the section dealing with the misfeasance summons. A misfeasance proceeding is merely an examination by the court into the conduct of an officer of the company, and as a result of that examination the court may order the officer to restore the money or the property of the company, as the court may think just. Such proceedings cannot be said in any way to be a "suit or other legal proceeding" within the meaning of section 280 of the Indian Companies Act. I am supported in this view by a consideration of another English authority, *In re Strand Wood Co.* (2), where it was held that it was not the practice of the court to require a liquidator on the ground of poverty to give security for the costs of a misfeasance summons. It is to be noted that the section of the English Act at the date of this authority was precisely the same as section 280 of the Indian Companies Act.

On grounds of general policy also it appears to me that it is impossible for any such rule to exist. The result of any such practice would be that directors or other officers of a company could fraudulently misappropriate, or otherwise do away with, all the funds and properties of the company, and the more thoroughly they so exhausted the funds the more certain it would be that they would escape the consequences of their fraud. All they would have to do, if the applicant's

(1) (1890) 25 Q.B.D., 235.

(2) [1904] 2 Ch., 1.

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contention is sound, would be, on a misfeasance summons being directed against them, to apply to the court for the liquidator to provide security for their costs, as the company had no assets,—the fact that the company had no assets being entirely due to the fraud of the officers of the company themselves. This application is dismissed with costs. I fix counsel's fee at Rs.32.

REVISIONAL CRIMINAL

Before Mr. Justice Bajpai

EMPEROR *v.* SUKHDEO *

1932
December, 16

Indian Penal Code, section 499—Defamation—Publication—Reply to official notice issued by President of Notified Area—Defamatory allegations against President contained in the reply.

A notice under section 185 of the Municipalities Act was issued by the President of a Notified Area to a certain person, who sent a reply containing defamatory allegations against the President. This reply was put on the official file by the President and it was read by the members of the Notified Area Committee. *Held*, there was publication of the defamation. The placing of the reply on the official file was not a gratuitous or a voluntary act on the part of the President but it was his duty to do so, and the accused knew or must have known that the contents of his reply would be necessarily communicated to the persons connected with the office of the Notified Area.

Queen-Empress v. *Taki Husain*, I. L. R., 7 All., 205, distinguished.

Mr. *Saila Nath Mukerji*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

BAJPAI, J. :—This is an application in revision against the conviction of the applicant Sukhdeo under

* Criminal Revision No. 700 of 1932, from an order of R. Dayal, Sessions Judge of Mirzapur, dated the 23rd of September, 1932.

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section 500 of the Indian Penal Code. The facts of the case are that a notice under section 185 of the Municipalities Act was sent from the office of the Notified Area, Chunar, by which Sukhdeo was directed to close certain windows and a door. Sukhdeo replied to that notice and sent it to the President of the Notified Area, Babu Mathura Prasad. There can be no doubt that the contents of this reply are defamatory in the extreme inasmuch as they impute that Babu Mathura Prasad had sent the original notice under section 185 of the Municipalities Act because Sukhdeo had refused to accede to a demand of illegal gratification by Babu Mathura Prasad. In the ordinary course of official routine Babu Mathura Prasad put this reply on the records of the Committee and it was read by members of the Notified Area Committee. Babu Mathura Prasad filed a complaint on the 13th of September, 1928, upon which Sukhdeo was charged under section 500 and convicted and sentenced to three months' rigorous imprisonment and a fine of Rs.100. The said conviction and the sentence have been confirmed in appeal by the learned Sessions Judge.

In revision it is argued before me that the notice is not defamatory, that there was no publication and that the sentence is illegal. As I stated at the very outset it is impossible to argue that the contents of the notice are not defamatory. They are scandalous in the extreme and there can be no doubt that they were intended to harm the reputation of Babu Mathura Prasad. On the question of publication, reliance has been placed by the learned counsel for the applicant on the case of *Queen-Empress* v. *Taki Husain* (1). In that case a certain notice containing defamatory matter was sent by the accused to the city kotwal. The notice was drafted by a lawyer and copied by the lawyer's clerk. The accused was charged in that case not with the publication of the defamatory matter to

(1) (1884) I.L.R., 7 All., 205.

the lawyer or the lawyer's clerk but to the complainant, and the case on behalf of the prosecution was that the complainant did and had to show the notice to his superior officers and thus there was publication. It was held in that case that it was not at all necessary for the complainant to have shown the notice to his superior officers and communication of the defamatory matter to the complainant himself was not actionable in law. In the present case I do not base my decision on the publication of the contents of the notice to the lawyer or Baijnath who actually scribed the notice, because I find from the complaint that no grievance was made of that fact and the accused was not asked to defend himself on that point. It is, however, clear from the complaint that Babu Mathura Prasad took exception to the fact that the notice had to be put on the official file, and was as a matter of fact put on the official file, with the result that it was communicated to others. The facts of this case, therefore, are clearly distinguishable from the Full Bench case mentioned before, inasmuch as it was the duty of Babu Mathura Prasad to place this notice on the record. It was not a gratuitous or a voluntary act on his part but it was an act which had to be done in the course of official routine. We have the evidence of Babu Bindeshri Prasad, a member of the Notified Area, to the effect that the reply of Sukhdeo came into the office and was read by the members. For publication it is sufficient if the accused intentionally does an act which has the quality of communicating the alleged libel to a third person or persons generally. The accused knew or must have known that the contents of his notice would be necessarily communicated to the persons connected with the office of the Notified Area. I am, therefore, of the opinion that there was publication within the meaning of section 499 of the Indian Penal Code.

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The last contention that the sentence is illegal is undoubtedly valid. This matter seems to have escaped the notice of the trying Magistrate as well as the learned Sessions Judge. Under section 500 of the Indian Penal Code the imprisonment cannot be rigorous, but needs must be simple. The result is that I allow this application to this extent that I alter the nature of the punishment and direct that the three months' imprisonment shall be simple. It is not possible for me to reduce the term of imprisonment or to remit the fine inasmuch as there is not the slightest doubt that the accused aggravated the offence by adducing evidence to show that Babu Mathura Prasad had really demanded illegal gratification through Mahadeo, chaprasi, and that that justified the imputation. With the above modification I dismiss this revision.

REVISIONAL CIVIL

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December, 19

Before Mr. Justice Kendall

KISHAN LAL BABU LAL (PLAINTIFF) *v.* RAM CHANDRA (DEFENDANT) *

Civil Procedure Code, section 115; *order VI, rule* 17—*Order refusing amendment of plaint—Revision—"Case decided"—Other remedy available.*

In a suit for money due on account of certain business transactions between the parties the defendant took a plea that some of the items claimed were barred by limitation. Thereupon the plaintiff applied to amend the plaint by introducing a reference to an acknowledgment which the plaintiff alleged had been made by the defendant. The Munsif refused to allow the amendment on the ground that the application was unduly delayed and that it would be unfair to the defendant to allow it. In revision from the order of refusal—

Held that the revision was maintainable. The effect of the order being definitely to shut out a part of the plaintiff's claim, the order was a final decision of the court on that part of the case and so could be brought within the meaning of the words

* Civil Revision No. 441 of 1932.

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"case decided" in section 115 of the Civil Procedure Code. Having regard to the provisions of order VI, rule 17, it was the duty of the court to have allowed the amendment, which was not one that would have altered the nature of the suit, in order to enable the questions in controversy between the parties to be determined once for all, and in refusing to allow the amendment it failed to exercise a jurisdiction vested in it by law.

The plaintiff had, no doubt, another remedy against the order of refusal, by way of a ground of appeal from the ultimate decree; but it could not be laid down as a general proposition that the High Court would not interfere in revision whenever there was another remedy open. Where the effect of allowing a revision, in a matter in which an appeal might also lie, will be a convenience to the parties and will save expense, the court will be inclined to interpret the provisions of section 115 liberally and to interfere with an order which has been passed without jurisdiction, or illegally or with material irregularity in the exercise of its jurisdiction.

Mr. *S. B. L. Gaur*, for the applicant.

Dr. *N. C. Vaish*, for the opposite party.

KENDALL, J. :—This is an application for the revision of an order of the Munsif of Kasganj refusing to allow the applicant, who is the plaintiff in the suit, to amend his plaint. The suit was one for a sum of Rs.307 odd, said to be due on account of certain business transactions between the parties from the 11th of December, 1926, to the 11th of March, 1929; and after the original *ex parte* decree had been set aside and the suit restored, the plaintiff made an application to amend his plaint in answer to the written statement. In the written statement it had been pleaded that some of the items named in the plaint were barred by limitation, and the plaintiff therefore applied to amend the plaint with reference to an acknowledgment said to have been made by the defendant on the 27th of July, 1929. The Munsif refused to allow the amendment on the ground that the application was unduly delayed and that it would, in the circumstances, be unfair to the defendant to allow the application.

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Under rule 17 of order VI of the Code of Civil Procedure an amendment of the pleadings may be allowed at any stage, and "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." If therefore it was necessary to decide as between the parties whether this alleged acknowledgment was to be proved or not, the court should not, it is argued, have allowed considerations of equity to interfere with the mandatory provisions of rule 17.

The application has been opposed on the grounds that the decision of the court does not amount to a "case decided" as contemplated by section 115 of the Code of Civil Procedure, that the court has not dismissed the application summarily or without consideration, and finally because no application for revision ought to be entertained where another remedy lies.

The question of whether the decision of the court below amounts to a "case decided" can be answered shortly by pointing to the fact that it does virtually shut out a part of the plaintiff-applicant's claim. It is not necessary here to refer to all the definitions of a "case decided" which have been recorded in the various High Courts, because in fact the word "case" in this section has not received a final and authoritative definition. In a recent decision of this Court a Bench of this Court remarked: "It therefore seems to us that the Full Bench case, i.e., the well known decision in *Buddhu Lal* v. *Mewa Ram* (1), is an authority for the proposition that no revision lies from a finding recorded by the trial court on *one or more issues out of several that are before it for disposal*. There was no majority in favour of the broad proposition that no revision lies from an interlocutory order." Where the effect of the order of the court below is definitely to debar the plaintiff from proving a part of his claim, that is a final decision of the court on that part of the

(1) (1921) I.L.R., 43 All., 564.

case, and in my opinion it can be brought within the meaning of the words "case decided" under section 115.

As regards the second argument, the Munsif has no doubt considered the point, but he has not considered it from the right point of view. It is quite clear that the application made by the plaintiff, if allowed, would not have changed the nature of the suit. He merely wished to prove an acknowledgment, and that acknowledgment would not have been, as Dr. *Vaish* suggested for the opposite party, a new cause of action, but merely a piece of evidence. There was a controversy between the parties about money due on business transactions, and whether the acknowledgment was a genuine one or not, this matter had to be set at rest for the purpose of determining the real question in controversy between the parties. The fact that the application for amendment may have been "unduly delayed" might influence the Munsif in deciding whether the acknowledgment was genuine, but ought not to have constrained him to dismiss the application itself.

The most serious objection that has been made to the present application is that it has been held by this and by other High Courts that no revision will lie where there is an appeal. The question of whether a pleading should be amended has been more than once made the subject of appeal. Dr. *Vaish* has been able to point to the cases of *Bisheshar Prasad* v. *Gobind Ram* (1), in which a similar question of amendment was the only point urged in the appellate court, and *Mumtaz Ali* v. *Kasim Ali* (2), where it was certainly one of the grounds in appeal. In the case of *Nand Ram* v. *Bhopal Singh* (3) a Bench of this Court has ruled that " an application under section 115 of the Code of Civil Procedure cannot be entertained in the case of those interlocutory orders against

(1) (1914) 12 A.L.J., 833. (2) (1913) 11 A.L.J., 423.
(3) (1912) I.L.R., 34 All., 592.

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which, though no immediate appeal lies, a remedy is supplied by section 105, which provides that they may be made a ground of objection in appeal against the final decree"; and I have also been referred to a case of the Madras High Court in *Penumarli Vasantarayadu* v. *Reddi Subbamma* (1) in which the identical question at present raised was decided against the applicant for amendment. On the other hand in the case of *Lila* v. *Mahange* (2) it has been held by a Bench of this Court that "It cannot be laid down as a general proposition that the High Court has no power of interference at all or should not interfere where there is another remedy. . . open to the applicant. . . Each case must be considered on its own merits." It is true that the case of *Nand Ram* v. *Bhopal Singh* is not referred to in that decision and may not have been brought to the notice of the Bench; but in another recent decision in *Ram Sarup* v. *Gaya Prasad* (3) a Full Bench of this Court interfered in revision with an appellate order which might apparently have been made the subject of an appeal, and in the course of the judgment all three of the learned Judges expressed views differing from that expressed by the Bench in *Nand Ram* v. *Bhopal Singh*. The view has been expressed more than once that where the effect of allowing a revision, in a matter in which an appeal might also lie, will be a convenience to the parties and will save expense, the court will be inclined to interpret the provisions of section 115 liberally and to interfere with an order which has been passed without jurisdiction, or irregularly, illegally or with material irregularity in the exercise of its jurisdiction. The present case is not without difficulty, but I am strongly of opinion that the court ought to have allowed the amendment in order to enable the controversial matter between the parties to be settled once for all; and that in refusing to allow the amendment it failed to exercise a jurisdiction vested in it by law.

Dr. *Vaish* has finally referred to an unreported decision of a Bench of this Court, the case of *Ghulam Husain* v.

(1) (1913) 22 Indian Cases, 39. (2) (1931) I.L.R., 54 All., 183.
(3) (1925) I.L.R., 48 All., 175.

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Ghulam Mohammad, in which it has been held that no revision lies against an order refusing permission to amend a written statement in such a way as to change the entire nature of the defence. The Bench held in that case that there had been no case decided and that no revision was maintainable. The circumstances are clearly distinguishable from the present case in which, as I have held, a case has been decided because a refusal to allow the plaint to be amended does shut out a part of the plaintiff's claim, and the proposed amendment itself does not alter the nature of the plaintiff's suit.

For these reasons I allow the application with costs and direct that the amendment prayed for by the applicant be made in the plaint, and that the court shall thereafter proceed to hear the suit on its merits.

REVISIONAL CRIMINAL

Before Mr. Justice Bajpai.

EMPEROR *v.* MUHAMMAD HASHIM.*

1932
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Criminal Procedure Code, sections 435, 439—*Revision—Practice of High Court—Previous application in revision to Sessions Judge or District Magistrate essential to High Court entertaining revision.*

According to a practice of the High Court an application in revision to the Sessions Judge or to the District Magistrate is an essential step in the procedure of filing a criminal revision in the High Court, and failure on the part of the applicant in this respect operates as a bar to the application being entertained by the Court.

The fact that there has been an appeal to a Magistrate, first class, or even to the District Magistrate is not a compliance in principle with this rule. Inasmuch as a revision should and generally does cover different grounds from an appeal, an appeal to the District Magistrate does not serve the object underlying the rule in the same way as a revision would.

* Criminal Revision No. 648 of 1932, from an order of Shambhu Nath, Magistrate, first class, of Benares, dated the 9th of August, 1932.

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An order of admission made by a Judge of the High Court under clause (1) of section 435 of the Criminal Procedure Code is not sufficient to take the case out of the operation of such rule of practice.

The dictum to this effect in *Emperor* v. *Mansur Husain*, I. L. R., All., 587, not followed.

Mr. *Mansur Alam*, for the applicant.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

BAJPAI, J.—This is an application in revision against an appellate order of a Magistrate confirming the conviction and sentence passed upon the applicant by a Special Magistrate of [illegible] liminary objection has [illegible] It is true that the case of precluded from [illegible] *Singh* is not [illegible] the present application by reason [illegible] not have been [illegible] form practice of this High Court refu[illegible] in anoth[illegible] ntertain an application in revision where the [illegible] *sad* (3) [illegible] cant has not gone *in revision* either to the Sessions Judge or to the District Magistrate. There can be no doubt that in this Court there has grown a practice that an application in revision to the lower court is an essential step in the procedure, and failure on the part of the applicant in this respect operates as a bar to the application being entertained by this Court. This was laid down in the case of *Sharif Ahmad* v. *Qabul Singh* (1). That case purported to follow and to approve of the case of *Emperor* v. *Mansur Husain* (2). The applicant, however, argues that in the present case there has been an appeal to a Magistrate competent to entertain the appeal, and the principle underlying the practice has therefore been followed. But I find that in the case of *Nathe Singh* v. *Emperor* (3) KENDALL, J., refused to entertain an application because the applicant had not gone in revision to the Sessions Judge, even though there had been an appeal to the District Magistrate. In another case, *Sukhraj Singh* v. *Emperor* (4), KENDALL, J., once more refused to entertain an application in revision

(1) (1921) I.L.R., 43 All., 497.
(2) (1919) I.L.R., 41 All., 587.
(3) A.I.R., 1927 All., 829.
(4) A.I.R., 1927 All., 834.

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although there had been an appeal to the District Magistrate, and pointed out that the objects of laying down the said rule of practice were, in the first place, to prevent the time of the High Court from being wasted by frivolous or unsustainable applications, and, secondly, to obtain an expression of opinion by a court of superior jurisdiction such as that of the Sessions Judge or the District Magistrate, in case the matter should eventually come before the High Court. He also said that the latter object could not be attained by an appeal to the District Magistrate as well as it could by an application in revision, for the latter should and generally does cover different grounds from an appeal. It has, however, been argued before me that in *Mansur Husain's* case (1) PIGGOTT, J., held that an order of admission made by a Judge of the High Court under clause (1) of section 435 of the Code of Criminal Procedure, though passed *ex parte*, will be sufficient to take the case out of the operation of such rule of practice. This dictum of the learned single Judge was not followed in effect in the three cases which I have mentioned before, at least in the two cases decided by KENDALL, J. I am of opinion that the salutary effect of the rule would to a great extent be reduced if the dictum of PIGGOTT, J., be followed. I am, therefore, of opinion that I am precluded from entertaining the present application at this stage and I dismiss it.

Before Mr. Justice Bajpai.

EMPEROR *v.* SAT NARAIN PANDEY.*

1932 *December*, 21

Indian Penal Code, section 304A—Causing death by rash or negligent act—Motor lorry—Death due to collision with another lorry—Responsibility for the collision and not mere rash driving must be established—Causa causans.

Accused was driving a motor lorry, which collided with another lorry coming in the opposite direction, with the result that a passenger on the accused's lorry was thrown out and died of the injuries. At that time another lorry was proceeding in front of the accused's lorry and a car had just passed the

* Criminal Revision No. 735 of 1932, from an order of W. Madeley, Sessions Judge of Benares, dated the 10th of August, 1932.

(1) (1919) I. L. R., 41 All., 587.

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place; consequently a cloud of dust had gathered and visibility was very dim. The finding on the evidence was that the accused was driving too fast, considering the lack of visibility, and that this act of driving too fast was rash and negligent. There was no finding that the accused was responsible for the collision. *Held* that the conviction under section 304A of the Indian Penal Code could not stand. For a conviction under that section it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence; it must be the *causa causans*. In the present case the death was due to the collision, and unless it was found as a fact that the collision was entirely or mainly due to the act of the accused his conviction could not be sustained.

Messrs. *P. L. Banerji* and *Kedar Nath Sinha*, for the applicant.

The Assistant Government Advocate (Dr. M. *Wali-ullah*), for the Crown.

BAJPAI, J.:—The accused applicant was convicted by a learned Magistrate under section 304A of the Indian Penal Code and sentenced to six months' rigorous imprisonment and a fine of Rs.100. The conviction and sentence were confirmed in appeal by the learned Sessions Judge.

The facts are that the accused was driving a motor lorry No. 1064 from Mirza Murad to Benares. Another lorry No.1034 was coming in the opposite direction from Benares to Mirza Murad. There was then a collision, as a result of which a woman in lorry No. 1064 fell out, received injuries on the head and died. Near about the time of this collision there was another lorry going in front of lorry No. 1064 and there was further a small car which had passed just about that time. The natural consequence of these four vehicles passing on the road about the same time was that a cloud of dust had gathered, and visibility was very dim.

It has been argued before me that the death of the woman cannot be attributed directly to any action of the accused, and there is no finding by the court below to that effect. What the lower appellate court has found definitely is that the accused was driving too fast, considering

the lack of visibility, and that this act of driving too fast was rash and negligent. This, to my mind, is not enough to fix a criminal liability on the accused. The death of the woman was due to the collision and unless the courts below find as a fact from the evidence on the record, which, it must be conceded, in the present case is very conflicting, that the accused was responsible for the collision, his conviction under section 304A is not legally sustainable. The learned counsel on behalf of the applicant has relied on the case of *Emperor* v. *Omkar Ram Pratap* (1), and I am of the opinion that the law has been laid down correctly in that case. It was held that to impose criminal liability under section 304A, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans;* it is not enough that it may have been the *causa sine qua non.* It is conceded that if on account of the fast driving of the applicant the woman had been by reason of a jerk thrown out of the lorry and killed, or if some pedestrian in the way had been knocked down and killed, the applicant could have been legally convicted under section 304A. But in the present case the death of the woman was due to the collision, and in order to impose a criminal liability on the accused it must be found as a fact that the collision was entirely or at least mainly due to the act of the applicant and there being no such finding by the lower appellate court, his conviction cannot be sustained. I am, therefore, of the opinion that so far as the evidence in the present case goes it is not sufficient to establish that the accused was wholly or mainly responsible for the collision. The result is that I allow this application, set aside the conviction and sentence and direct that the accused be forthwith set at liberty, and the fine, if paid, be refunded.

(1) (1902) 4 Bom. L.R., 679.

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the plaintiff became the owner of it." This finding of fact would have been conclusive in second appeal and not open to discussion, but the appellant has seriously challenged it on the ground that the burden of proof has been wrongly thrown on the plaintiff. It is argued that the sale deed of the 25th of January, 1891, being in favour of the plaintiff he is *ex facie* the owner of the property conveyed thereby, and that the burden of proving that it was *benami* for defendant No. 2 lay on the first defendant who impugned the ostensible character of the deed. As regards the building subsequently erected on the site of the kachcha house acquired under the aforesaid sale deed, it is contended that the ownership of the superstructure follows the ownership of the land on which it stands, and that *prima facie* the owner of the land also owns everything permanently attached to it.

On behalf of the respondent we have been referred to a number of decisions of various High Courts in which it was held that the ordinary rule as regards burden of proof does not apply where the plaintiff who unsuccessfully objected to attachment under order XXI, rule 58 of the Code of Civil Procedure institutes a suit for the establishment of his right to the attached property, relying on a deed of transfer which is impugned by the successful decree-holder on the ground that it is *benami* for his judgment-debtor. It is said that in such a case the plaintiff ought to establish not only the due execution of the deed of transfer in his favour, but he should go further and establish that the ostensible transferee under the deed is also the real transferee. In other words, it should be presumed after the plaintiff's objection to attachment has been dismissed that the deed is *benami* for the judgment-debtor unless the contrary is proved by the plaintiff. This contention finds support from the case of *Govind Atmaram* v. *Santai* (1), in which a Division Bench of the Bombay High Court held, relying on two earlier cases of that Court,

(1) (1887) I.L.R., 12 Bom., 270.

that: "The defendant had obtained an order maintaining his attachment, and it was incumbent on the plaintiff, who impugns that order by the present suit, to prove her case. For this purpose it would be necessary for the plaintiff to prove the payment of the purchase money, and that she had since been in possession." This case was followed in *Nannhi Jan* v. *Bhuri* (1), in which a Division Bench of this Court held "that a party intervening in the execution department, and failing in his objection to an attachment, and consequently being obliged to bring a suit under section 283 of the Code of Civil Procedure (order XXI, rule 63 of the Code of Civil Procedure, 1908) must give *prima facie* evidence to establish the genuineness of the document upon which he relies." The report shows that "genuineness of the document" was meant by the learned Judges to indicate real character of the deed and not due execution of the document. The learned Judges referred to several earlier cases of this Court in which the same view had been taken as in *Govind Atmaram* v. *Santai* (2). The learned Judges also noted the case of *Suba Bibi* v. *Balgobind Das* (3), in which a Division Bench of this Court had taken a contrary view. Following the Bombay High Court and this Court it was held by the Calcutta High Court in *Jamahar Kumari Bibi* v. *Askaran Boid* (4) that "a suit under order XXI, rule 63 of the Code of Civil Procedure is a suit to alter or set aside a summary decision or order of the court, and is a method of obtaining review". It was further observed that "the plaintiff in the circumstances of this case cannot discharge the burden of proof cast on her by merely pointing to the innocent appearance of the instruments under which she claims; she must show that they are as good as they look." A learned single Judge of the Madras High Court took the same view in *Modadugu Perayya* v. *Peroli Venkayamma* (5).

(1) (1908) I.L.R., 30 All., 321.
(2) (1887) I.L.R., 12 Bom., 270.
(3) (1886) I.L.R., 8 All., 178.
(4) (1915) 22 C.L.J., 27.
(5) (1924) 47 M.L.J., 14.

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A comparatively recent pronouncement of their Lordships of the Privy Council made in *V. E. A. R. M. Firm* v. *Maung Ba Kyin* (1) has definitely laid down that "the plaintiffs being the ostensible owners of the property under a duly registered deed and a deed of transfer, the party claiming to attach that property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one, and that could only be done in this case (there is no other evidence) by showing utter inadequacy of consideration." The case was one in which the ostensible owner had objected to the property in dispute being attached and, on an order under rule 58 of order XXI of the Code of Civil Procedure being passed against him, instituted a regular suit under order XXI, rule 63 of the Code of Civil Procedure to establish his right.

A Division Bench of the Patna High Court has held, following the above Privy Council ruling, in *Gillu Mal* v. *Firm Manohar Das Jai Narain* (2) that where a suit is brought under order XXI, rule 63 of the Code of Civil Procedure by a party against whom an order was made in a claim case the plaintiff would not be in a worse position as regards burden of proof than that in which he would have been if no claim case had been brought at all.

There is no doubt that the Privy Council case to which reference has been made above is an authority for the proposition that an ostensible owner of the property whose objection has been dismissed under order XXI, rule 58 of the Code of Civil Procedure, and who, therefore, brings a suit under order XXI, rule 63 of the Code of Civil Procedure for establishment of his right, is not called upon to establish not only the due execution of the deed of conveyance by the original owner but also that he was not the *benamidar* for the judgment-debtor as alleged by the decree-holder. The

(1) A.I.R., 1927 P. C., 237. (2) (1928) I.L.R., 7 Pat., 777.

rule that in such a case the plaintiff must establish his title is not departed from. The quantum of onus is, however, the same as in an ordinary case in which the *benami* character of an instrument is in question. The initial onus undoubtedly rests on the plaintiff. He has to establish his title to the property; but having established the due execution of the deed of conveyance by one who admittedly owned the property, the apparent tenor of the deed must prevail unless it is established by the defendant that the ostensible owner is only a *benamidar*. The onus cannot rest on the plaintiff *ad infinitum* and shifts according to the ordinary rules of evidence.

Govind Atmaram v. *Santai* (1) and *Nannhi Jan* v. *Bhuri* (2) were both decided under the Code of Civil Procedure of 1882, section 283 of which was somewhat differently worded from the corresponding provision in the Code of 1908, namely order XXI, rule 63. It might have been permissible under the older Code to hold that if the court executing the decree dismissed the claimant's objection to attachment, expressly holding that the deed relied on by him was *benami*, he must establish in the regular suit that the decision of the court executing the decree was incorrect. Section 283 ran as follows: "The party against whom an order under section 280, 281, or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive." It was held repeatedly in cases arising under the old Code that if the objection was not inquired into and decided on the merits, the claimant was not bound to institute a regular suit within the shorter period of one year provided by article 11, Schedule I of the Indian Limitation Act. This view was based on the wording of section 283, which was construed as implying that the order must be "under section 280, 281, or 282", that is, it

(1) (1887) I.L.R., 12 Bom., 270. (2) (1908) I.L.R., 30 All., 321.

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must expressly decide the objection on its merits in terms of the one or the other of the sections referred to. Order XXI, rule 63 of the Code of Civil Procedure of 1908 runs as follows: "Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive." The scope of rule 63 is wider than that of section 283 of the old Code. The former makes a title suit within the period of one year necessary by a person who preferred an objection and "against whom an order is made". To our minds this is the only ground on which it is possible to reconcile the view taken in the cases decided by the Indian High Courts with the view now expressed by their Lordships of the Privy Council. Whether the ground suggested above is well founded or not, we must follow the Privy Council case, which, if not reconcilable in the manner suggested above, should be deemed to have overruled the contrary opinion previously expressed by the High Courts. We must take it to be the law that, in a case like this, the plaintiff having established due execution of the sale deed in his favour by a person who was admittedly the owner of the property to which it relates, he should be deemed to have discharged the initial onus which lay upon him, and the burden of proof being thus shifted on the defendant, the latter must establish the *benami* character of such deed by showing that the consideration proceeded from the alleged owner, or otherwise.

In the case before us the old house purchased in the name of the plaintiff no longer exists and the question is whether the house as it now stands belongs to the plaintiff. We do not think that the matter should be approached as the plaintiff desires us to do. We cannot split the controversy into two distinct portions,

first, to hold that the site belonged to the plaintiff by virtue of the sale deed,—the defendant having failed to establish that defendant No. 2 paid the consideration,—and then to presume that the building standing on it belongs to the owner of the site. The more important part of the controversy is as to who constructed the house. In view of the finding arrived at by the lower appellate court that the house was constructed by defendant No. 2, it may be inferred that he had a right to build on the land in dispute. It is common ground that the plaintiff, who was only seven, had no funds of his own. The question is whether his maternal grandfather, or his father the defendant No. 2, supplied the fund. The fact that he, subsequent to the purchase, built the house gives rise to the inference that the latter had paid for the site. *Prima facie* where a person makes a costly building on a site and remains in possession of the building for a considerable length of time, the presumption is that he had a right to build on the land. In the circumstances of this case such right can only be referable to the circumstance that he was the owner of the land. He could be the owner of the site if the sale thereof in 1891 was *benami* for him In other words, the fact that defendant No. 2 built the house and remained in possession rebuts the presumption arising in plaintiff's favour. It is possible to read the judgment of the learned Subordinate Judge as if he proceeded on some such reasoning. It is true he discusses in the first instance the question whether the plaintiff is the real owner of the site, throwing the burden on him, and then proceeds to consider the second question as to whose funds were employed in building the house. It is likely that his finding on the latter question influenced his judgment on the first. In all the circumstances of the case we are not disposed to interfere with his finding of fact as regards the ownership of the house in dispute. The result is that the appeal fails, and is dismissed with costs.

REVISIONAL CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Kisch

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LAKSHMI NARAIN RAI (PLAINTIFF) *v.* DIP NARAIN RAI (DEFENDANT)*

Court Fees Act (VII of 1870), *section 7(iv) (c); schedule* II, *article* 17(iii)—*Suit for declaration—Declaration that compromise decree is void and declaration of ownership and possession—Consequential relief not asked for—Wrong order demanding additional court fee—Revision—Civil Procedure Code, section* 115—"*Case decided*"—*Other remedy available.*

The plaintiff sued for a declaration that he was the owner in possession of a certain property. A further prayer was added for a declaration that a certain compromise decree, which had been passed against him in a former suit respecting that property, was obtained by fraud and therefore void and ineffectual against him. It was expressly stated that no consequential relief for the cancellation of the compromise decree was sought for. *Held*, that as no consequential relief was prayed for, the court fee payable was Rs.20 for the two declarations, and an *ad valorem* court fee was not payable. *Kalu Ram* v. *Babu Lal* (1), distinguished.

Held, also, that a revision against the order of the Munsif demanding the payment of an *ad valorem* court fee on the plaint was maintainable. The determination of the question whether an additional court fee should be paid or not marked the termination of a definite stage of the suit and settled the controversy between the parties on the particular point. The order, therefore, amounted to a "case decided" within the meaning of section 115 of the Civil Procedure Code; and the order directing payment of an additional court fee was really an order declining to exercise the jurisdiction of entertaining the suit unless the payment was made. Further, on the question of there being another remedy open to the applicant, it was doubtful whether in all circumstances the applicant would have another remedy. If he paid the additional court fee and was successful in his suit and the other side did not appeal, the applicant would have no remedy for the excess payment, although he might fail to recover his costs from the defendant.

* Civil Revision No. 385 of 1932.

(1) (1932) I.L.R., 54 All., 812.

Mr. *Krishna Murari Lal*, for the applicant.

Mr. *K. L. Misra*, for the opposite party.

NIAMAT-ULLAH and KISCH, JJ. :—The question raised in this application for revision is what is the correct court fee payable on the plaintiff applicant's plaint in which he seeks a declaration that he is the owner in possession of certain zamindari property.

The plaint recites that suit No. 24 of 1901 was instituted by the plaintiff when a minor under the guardianship of his mother to get possession of the said property in respect of which Mangla Prasad Rai, the half-brother of the plaintiff's grandfather and the father of the defendant, had got his name entered in the revenue papers on the death of Mst. Ram Dei Kuar, the widow of the plaintiff's great-uncle. It further avers that this suit had been struck off through the collusion of the mukhtar khas of the plaintiff's mother with Mangla Prasad Rai and that the latter had caused an appeal to be preferred and a compromise to be entered into in the appellate court by a person incompetent to enter into a compromise on behalf of the minor plaintiff. The allegation in the plaint is that the compromise decree was obtained by fraud.

The relief prayed for in the plaint as originally preferred was that it may be declared by the court that the plaintiff is the owner in possession of the property in suit. A court fee of Rs.10 was paid on the plaint. Thereafter the plaintiff applied for the plaint to be amended by the addition of certain words at the beginning of the prayer for relief. The amended prayer read as follows: "On account of the fact that the decree in suit No. 24 of 1901 is according to law null and void, illegal and ineffectual, it may be declared, etc. . . ."

The court below held that by the insertion of these words the plaintiff was asking for the cancellation of the decree in suit No. 24 of 1901, and, this being a consequential relief, an *ad valorem* court fee should be

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paid, based on the value of the property concerned. The learned Munsif relied for this view on the decision of the Full Bench of this Court in *Kalu Ram* v. *Babu Lal* (1).

The correctness of the order of the learned Munsif is challenged by the plaintiff in the present application for revision on the ground that the relief asked for is still only one of declaration and that no consequential relief is prayed for. It is contended on behalf of the applicant that the only effect of the amendment of the plaint is that two declarations are now asked for, firstly, that the decree in suit No. 24 of 1901 is null and void as against the plaintiff, and secondly, that the plaintiff is the owner of the property in suit, and that accordingly only the court fee payable in respect of prayers for mere declaration need be paid. The learned counsel for the applicant has stated before us in express terms that the consequential relief of the cancellation of the compromise decree is not asked for and that the applicant is prepared to take the consequences of the failure to ask for such consequential relief, whatever they may be.

In view of these clear statements by the applicant's counsel it seems to us that his contention as to the court fee payable must be accepted. It has been held by this Court in a very similar case that a suit for a mere declaration that a compromise and a decree on its basis are null and void is not to be deemed one in which consequential relief is prayed: *Radha Krishna* v. *Ram Narain* (2). In that case the relief originally prayed and on which a court fee of Rs.10 had been paid was for cancellation of a compromise and the decree based upon it, on the allegation that the plaintiff was a minor and that he was not bound by the compromise and decree which were obtained by fraud. On objection being raised the plaintiff amended his plaint to the effect that it be declared that the petition of compromise

(1) (1932) I.L.R., 54 All., 812. (2) (1931) I.L.R., 53 All., 552.

and the decree were ineffectual as against the plaintiff and that he was not bound thereby. It was held by a Bench of this Court that the plaint as amended was sufficiently stamped, the suit as framed being to obtain a declaratory decree where no consequential relief was prayed. It was further held that the question of court fee must be decided on the plaint and the decision is not affected by the question whether the suit is maintainable under section 42 of the Specific Relief Act or by any action subsequently taken by the plaintiff to obtain an injunction otherwise than by amendment of the plaint. Similarly, in *Brij Gopal* v. *Suraj Karan* (1) it was held by a Bench of this Court that for the purpose of determination of the court fee the actual relief asked for should be looked into, and it is entirely beside the consideration of the court whether the suit is likely or not to fail because the plaintiff did not ask for a consequential relief.

We are of opinion that the principles laid down in these rulings apply to the present case. The case is distinguishable from *Kalu Ram* v. *Babu Lal* (2), because in that case there were distinct prayers for the cancellation of the mortgage deed impugned in the plaint and for the cancellation of the compromise and the decree.

In our opinion the effect of the amendment is to add to the relief originally prayed for, a prayer for a further declaration that the decree in suit No. 24 of 1901 is ineffectual against the plaintiff, for which he must pay a further court fee of Rs.10.

It has been contended by the learned counsel for the opposite party that no revision lies, because the order of the court below directing the payment of additional court fee is merely an interlocutory order, no case has been decided within the meaning of section 115 of the Code of Civil Procedure and the plaintiff's proper

(1) [1932] A.L.J., 466. (2) (1932) I.L.R., 54 All., 812.

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course was to wait for the dismissal of the suit by disobeying the order and then move this Court by way of appeal.

In our opinion this contention cannot be accepted. In *Ramrup Das* v. *Mohunt Shiyaram Das* (1) it was held by a Bench of the Calcutta High Court that the High Court can interfere in revision in such interlocutory orders where the orders appear to be a denial of jurisdiction. The same view was taken by the Madras High Court in *Dodda Sannekappa* v. *Sakravva* (2) in which it was held that an order for payment of deficient court fee was really an order declining to entertain jurisdiction unless certain things were done. The High Court can interfere in revision with an erroneous order for payment of deficient court fee and it is not necessary that the plaintiff should wait for the dismissal of the suit by disobeying the order and then move the High Court by way of appeal or revision. A number of earlier decisions of the Madras High Court on the subject were reviewed by a Bench of that Court in *Kulandaivelu Nachiar* v. *Indran Ramaswami Pandia* (3) and the competency of the High Court to interfere with such an order in revision was re-affirmed. The Patna High Court has also interfered in revision with similar interlocutory orders in *Bankey Behari* v. *Ram Bahadur* (4) and *Maharaj Bahadur Singh v. Raja Prithichand Lal* (5).

No case of this Court interfering in revision with an order to pay additional court fee has been brought to our notice, but there are certain decisions of this Court which have a bearing on the point under consideration. In *Jagannath Sahu* v. *Chhedi Sahu* (6) the question before this Court was whether it could interfere in revision with an order refusing to supersede an arbitration when the arbitrator had been appointed without compliance with the provisions of paragraph 5 of the second

(1) (1910) 14 C.W.N., 932.
(2) (1916) 36 Indian Cases, 831.
(3) (1927) I.L.R., 51 Mad., 664.
(4) (1918) 44 Indian Cases, 891.
(5) A.I.R., 1929 Pat., 427.
(6) (1928) I.L.R., 51 All., 501.

schedule of the Code of Civil Procedure and the court had refused to supersede him on the application of the aggrieved party. It was held by a Bench of this Court that the order applied against was clearly an order deciding a case within the meaning of section 115 of the Code of Civil Procedure, and therefore the application for revision was competent. In the course of their judgment the learned Judges observed that "On the 29th of May, 1928, the controversy between the parties was whether the arbitration should be superseded or should be continued and another arbitrator appointed in place of Babu Bhagwati Prasad, as desired by the defendant. The court settled that controversy by its order of that date, which directed that the arbitration should continue and appointed Babu Ganesh Prasad to act as arbitrator. The controversy thus terminated. We think that the order of the learned Subordinate Judge in that connection was clearly an order deciding a case within the meaning of section 115 of the Code of Civil Procedure."

A similar view was taken in *Puran Lal* v. *Rup Chand* (1). The *ratio decidendi* in these cases is that where the order of the court below disposes of the entire matter in controversy at the particular stage of the case, such an order can be made the subject of an application in revision. We think that the same reasoning is applicable to the present case and the determination of the question whether an additional court fee should be paid or not marked the termination of a definite stage of the suit and settled the controversy between the parties on the particular point. In our opinion, therefore, the order of the court below is an order deciding a case and amounts to a failure to exercise a jurisdiction vested in that court. Such an order can be the subject of an application in revision to this Court.

(1) (1931) I.L.R., 53 All., 778.

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It is further contended that this Court ought not to interfere as there is another remedy open to the applicant. In the present case it is doubtful whether in all circumstances the applicant would have another remedy open to him. If the applicant having paid the additional court fee was successful in his suit and the other side did not appeal, the applicant would have no further opportunity to agitate the matter of his wrongly having been called upon to pay additional court fee, even though he might fail to recover his costs from the defendant.

We accordingly allow the application in revision with costs and direct that the plaint be admitted on the payment within two months of a further sum of Rs.10 as court fee.

Before Mr. Justice Iqbal Ahmad

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December, 23

LAL SINGH (PLAINTIFF) *v.* GULAB RAI (DEFENDANT)*

Limitation Act (IX of 1908), section 20, proviso—Part payment of principal—Acknowledgment of such payment in the handwriting of the debtor—Such acknowledgment need not be within limitation if the payment is within time.

The part payment of the principal of a debt, made within the period of limitation, gives a fresh start to the period of limitation, provided an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment. But it is not necessary that the acknowledgment of the payment in the handwriting of the debtor should be made within the period of limitation. It is enough if the payment is made within the period of limitation and it does not matter that the acknowledgment in writing is made by the debtor after the expiry of the period of limitation.

Mr. *Panna Lal*, for the applicant.

The opposite party was not represented.

IQBAL AHMAD, J. :—This is a plaintiff's application and is directed against the decree of a court of small

* Civil Revision No. 469 of 1932.

causes. The suit was for recovery of the amount due on the basis of an instalment bond dated the 22nd of December, 1924. The plaintiff alleged that certain payments that were made by the defendant gave a fresh start to the period of limitation and that in view of those payments the claim was within time.

The defendant did not contest the suit. The learned small cause court Judge observed: "None of those payments is in the defendant's handwriting. The last payment is of the 7th of May, 1926. Under these payments there is an endorsement in the defendant's hand to the effect that these payments had been made by him. The endorsement was obviously obtained from him after the 7th of May, 1926." He further noted that the plaintiff was unable to prove that the endorsement by the defendant was made within the period of limitation. As regards the endorsements with respect to the payments made after the 7th of May, 1926, the learned Judge observed that as those payments were made after the expiry of the period of limitation, they could be of no avail to the plaintiff. In this view of the matter he dismissed the plaintiff's suit.

I am unable to agree with the learned Judge of the court below. He is not right in observing that "none of those payments is in the defendant's handwriting". As a matter of fact, the endorsements about the payments made on the 6th of May, 1929, and on the 13th of November, 1931, are in the defendant's handwriting.

The endorsements about the payments made up to the 7th of May, 1926, are, no doubt, in the plaintiff's handwriting, but below those endorsements there is an acknowledgment by the defendant in his own handwriting to the effect that Rs.10 had been paid in part satisfaction of the debt due on the bond. In my judgment this endorsement by the defendant, though not proved to have been made within the period of limitation, was sufficient to extend to the plaintiff the benefit of the provisions of section 20 of the Limitation Act.

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The part payment of the principal of a debt within the period of limitation gives a fresh start to the period of limitation, provided an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment. In this case, as already stated, the acknowledgment of payment is in the handwriting of the defendant. But it is not necessary that the acknowledgment of payment should be made in writing by the debtor within the period of limitation. It is enough if the payment is made within the period of limitation and it does not matter that the acknowledgment in writing is made by the debtor after the expiry of the period of limitation. I cannot agree with the view of the learned small cause court Judge that, in order to be of use under section 20 of the Limitation Act, the handwriting of the person making the payment referred to in the proviso to that section must have come into existence before the expiration of the period of limitation. To so interpret the proviso would be to import into the proviso the words "before the expiry of the period of limitation"—words which are not there, and I find no warrant for doing so. The view that I take is in consonance with the view taken in *Venkalasubbu* v. *Appusundram* (1), *Marina Ammayi* v. *Sundayya* (2), and *Ram Prasad Babu* v. *Mohar Lal Babu* (3).

It is manifest, therefore, that the time began to run against the plaintiff from the 7th of May, 1926, but we find that within three years of that date, viz. the 6th of May, 1929, another payment was made by the defendant and an acknowledgment of that payment appears on the bond in suit in the defendant's handwriting. The suit was brought within three years from the last mentioned date and was within time.

For the reasons given above I allow this application, set aside the decree of the learned small cause court Judge and decree the plaintiff's suit with costs throughout.

(1) (1893) I.L.R., 17 Mad., 92. (2) A.I.R., 1929 Mad., 432.
(3) A.I.R., 1923 Nag., 117.

APPELLATE CIVIL

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kisch

LALTA PRASAD AND OTHERS (DEFENDANTS) *v.* GAJADHAR SHUKUL (PLAINTIFF)* 1932 *December*, 23

Hindu law—Father's debts—Liability of sons—Independent of whether the father is manager of the joint family—Independent of whether the joint family contains other members also—Nature of debt—Practice and pleading—Plaint alleging legal necessity for debt but not mentioning pious obligation of sons—Limitation—Stipulation that in default of payment of interest the principal also would become due.

The liability of a Hindu son to discharge his father's debts not tainted with immorality is irrespective of the fact whether the father is or is not the manager of the joint family, or of the fact whether the joint family does or does not also comprise persons other than the father and the sons, like brothers and nephews. All that is necessary to bring into play the pious obligation of the sons is that the debt must have been incurred by their father and must not have been raised for an immoral purpose.

In considering the question of the pious obligation of the sons care must be taken not to confuse two distinct aspects of the matter, (1) the father's power to alienate the sons' shares during his lifetime for debts incurred by him which were not raised for family necessity but at the same time were not tainted with immorality, and (2) the creditor's remedy for the recovery of such debts by sale of the sons' shares. The father can exercise the right to alienate the family property to discharge such debts only if the family consists of the father and the sons and of no other male members, for the simple reason that those other members are under no pious obligation to pay the debts of the father; but the creditor's right to recover such debts by sale of the sons' interests in the family property is untrammeled by any such limitation, for the obvious reason that his right is not co-extensive with or based on the father's right to alienate the family property but on the pious obligation of the sons, which is controlled only by the conditions that the debt should not be tainted with immorality and that it can be realized only from the joint ancestral property in the hands of the sons.

* First Appeal No. 345 of 1929, from a decree of Jagdishwar Nath Kaul, Additional Subordinate Judge of Benares, dated the 2nd of April, 1929.

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In a suit by the creditor against the father and the sons for recovery of a simple money debt taken by the father the allegation in the plaint was that the debt had been contracted for the benefit of the family, but this was not established : *Held*, that such allegation in the plaint did not exclude the possibility of the sons being made liable for the debt on the basis of their pious obligation, unless it was proved by them that the debt had been incurred for an immoral purpose; and the sons could not be deemed to have been prejudiced by the absence of an express allegation in the plaint that they were under a pious obligation to pay the debt of their father.

A stipulation in a bond entitling the creditor, on the occurrence of default in payment of six-monthly interest, to sue for the entire amount although the period fixed for repayment of the principal had not expired, is a stipulation for the benefit of the creditor, which it is open to him to waive at his option. If the creditor waives such option, the bond does not become payable until the expiry of the period fixed for repayment, and limitation begins to run from such expiry.

Messrs. *Shiva Prasad Sinha, Ambika Prasad, Ram Nama Prasad*, and *Kanhaiya Lal*, for the appellants.

Messrs. *N. P. Asthana* and *B. N. Sahai*, for the respondents.

IQBAL AHMAD, J. :—The question of law that arises in the present appeal is whether the sons (which expression in this judgment includes son's sons and son's son's sons) of a Hindu, who is the manager of a joint Hindu family consisting of himself, his sons and his nephews and grandnephews, are under a pious obligation to pay the debt incurred by him, when the debt was incurred neither to meet family necessities nor was tainted with illegality or immorality; and on the answer to that question depends the fate of this appeal.

The defendants appellants are the sons and grandsons of Raj Kumar Lal, who was also a defendant in the court below and is a *pro forma* respondent in the present appeal. The suit giving rise to the appeal was for recovery of the amount due on the basis of a simple money bond dated the 6th of April, 1923, executed by Raj Kumar Lal in favour of the plaintiff respondent.

The plaintiff originally filed the suit against Raj Kumar Lal alone, but on an application dated the 19th of December, 1927, being made by the plaintiff, the present defendants appellants and Debi Prasad and Chandi Prasad, the nephew and grandnephew respectively of Raj Kumar Lal, were also impleaded as defendants to the suit.

The bond in suit was for a sum of Rs.11,000 out of which a sum of Rs.1,272 was advanced in cash by the plaintiff to Raj Kumar Lal and the balance of Rs.9,728 was acknowledged by Raj Kumar Lal to be due to the plaintiff on five earlier bonds and promissory notes, three of which were executed by Raj Kumar Lal and two by Lalta Prasad, one of the sons of Raj Kumar Lal, and one of the appellants before us.

The plaintiff alleged that the debt evidenced by the bond had been incurred by Raj Kumar Lal as the head and karta of the family to meet family necessities and that all the defendants were liable to pay the same.

* * * * * *

Three separate written statements embodying identical pleas were filed on behalf of the defendants appellants. They asserted that they had separated from Raj Kumar Lal and that Raj Kumar Lal was not a member of a joint family along with them, nor was he the karta of the family. They further denied that the bond in suit was for consideration, or that the debt in suit was contracted for family necessity, or that they had in any way benefited by the same. They also pleaded limitation in bar of the plaintiff's claim.

The court below, on a consideration of the evidence in the case, found that Raj Kumar Lal and all the defendants were members of a joint Hindu family and that Raj Kumar Lal was the karta of that family, and that the partition decree, on which reliance was placed on behalf of the defendants in support of the plea of separation, was fraudulent. It held that the bond in suit was for consideration, but that no legal necessity for the debt had

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been proved and that the plaintiff did not make proper and *bona fide* inquiries as to the existence of the alleged necessities. It further held that the debts were not tainted with immorality or illegality, and that the suit was not barred by limitation. As a result of its findings it exempted Debi Prasad and Chandi Prasad from the claim and dismissed the suit against them. It, however, held that the defendants appellants, being the sons and grandsons of Raj Kumar Lal, were under a pious obligation to pay the debt in suit, as the debt was not raised for any immoral purpose, and accordingly decreed the suit *ex parte* against Raj Kumar Lal and passed a decree for the amount claimed against the defendants appellants, restricting it in its operation to the extent of the joint family property in their hands.

The decree dismissing the suit against Debi Prasad and Chandi Prasad has become final and in the present appeal we are only concerned with the question whether the court below was right in passing a decree against the defendants appellants, who are the sons and grandsons of Raj Kumar Lal.

The correctness of the findings on the questions of fact recorded by the court below has not been questioned before us, and the counsel for the parties stated that they accepted the accuracy of those findings. * * * * *

The question for consideration in the present appeal, therefore, is whether, having regard to the constitution of the family of which Raj Kumar Lal was the manager, the defendants appellants were under a pious obligation to pay the debt incurred by Raj Kumar Lal, when the debt was raised neither for family necessity nor was tainted with immorality.

It is not disputed that the sons are under a pious obligation to pay the pre-partition debts of the father, provided the debts are not tainted with illegality or immorality; and, further, it is well settled that this pious obligation is enforceable only to the extent of the joint family property in the hands of the sons and that the father's creditor

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is not entitled to proceed against the persons or separate properties of the sons. But it is contended by the learned counsel for the appellants that the pious obligation of the son is restricted only to those cases in which the family consists only of the father and his sons, and that a son does not labour under any such obligation if persons other than the father and the son, e.g. the brother or nephew of the father, are also members of the joint family. He further argues that the pious obligation of the son is confined only to the debt incurred by a father who is also a manager of the family and that the sons of the junior members of the family, who are not the managers of the family, are under no pious obligation to pay the debts incurred by their respective fathers. In other words, the argument is that there is no pious obligation on Hindu sons to pay the debts, of the class mentioned above, incurred by the father either (1) if the father was not the manager of the joint family, or (2) if, besides the father and sons, there are also other male members constituting the joint family, on whom there is no such pious obligation.

As it is now admitted that Raj Kumar Lal was also the manager of the joint family, it is not necessary for the decision of the appeal before us to decide whether it is essential for the application of the doctrine of pious obligation that the debt must be of a father who is also the manager of the joint family, and, therefore, the expression of opinion on the point must necessarily be in the nature of an *obiter dictum;* but as the point has been argued at length before us, I do not feel justified in not giving expression to my views on the subject.

It is conceded by the learned counsel that there is no direct authority in support of the propositions propounded by him, but he maintains that his contention is countenanced by the decision of their Lordships of the Privy Council in *Brij Narain* v. *Mangal Prasad* (1) and by certain observations contained in the judgment of this

(1) (1923) I.L.R., 46 All., 95.

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Court in *Binda Prasad* v. *Raj Ballabh Sahai* (1) and in the Full Bench decision of this Court in *Bankey Lal* v. *Durga Prasad* (2). He has further, in justification of his contentions noted above, drawn our attention to the observations of COUTTS TROTTER, C. J., in the Full Bench decision of the Madras High Court in *Subramania Ayyar* v. *Sabapathy Aiyar* (3), that the doctrine of pious obligation is "an illogical relic of antiquity unsuited to any but a primitive and patriarchal society", and that it is not to be extended beyond the limits made binding by decisions of unquestionable authority.

I am unable to agree with the contentions of the learned counsel for the appellants. I am not aware of any Hindu law text that circumscribes the pious obligation of a son within the limits contended for by the learned counsel for the appellants. Indeed the pious obligation of the sons, as recognized by original texts, was irrespective of any assets being received by them. No doubt judicial decisions have, in various respects, modified the obligation of the sons with respect to the payment of debts of their father as recognized by original texts, but it is manifest that the obligation rests on the religious duty of the son to discharge the father's debts and I can discover no justification for holding that the sons of a father, who is not the manager of the joint family, are under no such religious obligation, or that if the joint family consists of members over and above the father and the sons there is no such obligation on the sons. To put it in another way, every Hindu son is under a religious obligation to discharge his father's debts of the class mentioned above, irrespective of the fact whether the father is or is not the manager of the joint family, or whether the joint family is or is not composed of persons other than the father and the sons.

I find it difficult to understand and impossible to appreciate why the sons of the junior members of a joint

(1) (1925) 24 A.L.J., 273. (2) (1931) I.L.R., 53 All., 868.
(3) (1927) I.L.R., 51 Mad., 361.

Hindu family, or the sons of a manager of the family which also comprises brothers and nephews of the manager, should be absolved from the pious obligation which, so far as the Hindu law texts go, is imposed on every Hindu son, irrespective of the limitations contended for by the learned counsel for the appellants. It is to be remembered that law is not always a logical code, and, where the law is clear, it is not permissible to attempt to widen or to abridge its scope, simply to bring it into line with what, according to one's conception, the law should have been. The law as to the pious obligation of the Hindu sons, as evolved by judicial decisions, is not free from confusion, and to introduce further refinements of the nature that the learned counsel for the appellants advocates would be to make that confusion worse confounded; and, therefore, unless judicial decisions that are binding upon me lend support to his contentions, I am not prepared to introduce into this branch of the law exceptions which practically have the effect of nullifying the rule itself. With all respect to the observation of COUTTS TROTTER, C. J., noted above, I find myself unable to hold that the rule as to the pious obligation of the Hindu sons is unadapted to a progressive state of society and is therefore to be confined within the strictest possible limits. So far as I can see, this rule was introduced as a sort of corrective to the rule that every male member of a joint Hindu family acquires an interest in the joint family property from the moment of his birth, and therefore no member of such a family can predicate the extent of his share or can alienate the same. If by the mere fact of his birth the newly born son acquires an interest in the joint family property, and thus automatically reduces the extent of his father's interest in the same, it is but fair and just that he should shoulder, along with the father, the liabilities of the father. To make provision for the payment of debts due to a creditor, far from being "unsuited to any but a primitive and patriarchal society", is in consonance with common

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honesty and is, I should think, the recognized practice of the civilized world. The liability imposed on a son to pay the just debts of his father is not a gratuitous obligation thrust on him by Hindu law but is a necessary corollary—if not a salutary counter-balancing proviso—to the principle that the son from the moment of his birth acquires, along with the father, an interest in joint family property.

In *Brij Narain's* case (1) the proposition as to the pious obligation of the son was formulated by their Lordships of the Judicial Committee in the following words: "If he is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt." It is argued that their Lordships intended to lay down that the pious obligation of the son extends only to the debt incurred by a father who is also the manager of the family, and to confine the pious obligation only to cases in which the family consisted of the father and the sons. In the case before their Lordships the debt that formed the subject-matter of consideration was incurred by the manager of the family and the family consisted only of that manager and of his sons, and the above-mentioned proposition was laid down by their Lordships with reference to the facts of the case that they had to decide. To give effect to the contention of the learned counsel for the appellants would be to read after the word "father" in the above quotation some such words as "who is also the manager of the family", and after the word "sons" words to the effect "and no others", for which I find no justification. Indeed the proposition is couched by their Lordships in words that are of general application and is uncircumscribed by limitations of the nature contended for by the learned counsel for the appellants. All that is necessary to bring into play the pious obliga-

(1) (1923) I.L.R., 46 All., 95.

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tion of the sons is that the debt must have been incurred by their father and must not have been raised for an immoral purpose.

In the case of *Binda Prasad* v. *Raj Ballabh Sahai* (1) the questions now under consideration did not arise for decision, but reliance is placed by the learned counsel on certain observations made by MUKERJI, J., in the course of his judgment. The learned Judge observed that "The liability of the sons to pay their father's debt not tainted with immorality is the same whether the liability is enforced through the court or it is taken advantage of by the father in paying off his antecedent debts by private treaty. In my opinion the test is that the property which the father could sell in his lifetime is the only property that could be pursued by his creditor on his death in the hands of his sons . . . It is, therefore, only such property as was under the control of the father in his lifetime in order to pay his antecedent debts that can be followed in execution." On the basis of these observations it is argued that the pious obligation of the sons is co-extensive with the right of the father to dispose of the family property in order to liquidate his debts and that, where the father is not competent to utilize the family property for the payment of his debts by alienating the same, there is no pious obligation on the sons. It is said that as in the case before us there was no obligation on Debi Prasad and Chandi Prasad to pay the debts of Raj Kumar Lal, Raj Kumar Lal could not alienate the family property for the discharge of his debts, and, therefore, there was no obligation on the defendants appellants to pay the debts of Raj Kumar Lal, nor could such obligation be enforced by sale of their interest in the joint family property. If the learned Judges who decided *Binda Prasad's* case had affirmed the propositions advanced by the learned counsel for the appellants, I would not have taken the contrary view without considerable hesitation, but the learned Judges

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(1) (1925) 24 A.L.J., 273.

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in that case had to deal with a different set of affairs, and there was no pronouncement in that case on the questions before us. In that case the family consisted of one Bihari Lal, his son Tapeshwari Dayal and the sons of Tapeshwari Dayal. During the lifetime of Bihari Lal, Tapeshwari Dayal incurred some debts and then died leaving him surviving Bihari Lal and his own sons. The creditor obtained a simple money decree against Tapeshwari Dayal and after the death of Bihari Lal wanted to execute the same by attachment and sale of the family property in the hands of the sons of Tapeshwari Dayal, and the question for consideration arose whether he could do so in accordance with the provisions of section 53 of the Code of Civil Procedure, and it was decided by this Court that he was not entitled to do so. It is clear from the facts stated above that the facts in *Binda Prasad's* case were essentially different from the facts of the case before us and the decision in that case can be of no avail to the defendants appellants.

I may note in passing that, in considering the question of the pious obligation of the sons, care must always be taken not to confuse two distinct but well settled propositions of Hindu law: (1) The father's power to alienate the sons' share during his lifetime for debts incurred by him which were neither for family necessities nor were tainted with immorality, and (2) the creditor's remedy for the recovery of such debts by sale of the sons' shares.

The father can exercise the right to alienate the family property to discharge his debts only if the family consists of the father and the sons *and of no other male members*, for the simple reason that those other members are under no pious obligation to pay the debts of the father; but the creditor's right to recover the debt by sale of the sons' interests in the family property is untrammeled by any such limitations, for the obvious reason that his right is based not on the father's right to alienate the family property but on the pious obligation of the sons and is independent of the right of the father to alienate the sons'

interest. In other words, the creditor can pursue his remedy by sale of the sons' interest in the family property, even though the father, having regard to the constitution of the family, cannot alienate the same. It is well settled that the undivided interest of a coparcener in a joint Hindu family governed by the Mitakshara law can be attached and sold in execution of a decree against him for his personal debts, even though the coparcener is incompetent to sell his interest for the payment of his debts; and the purchaser can, after purchasing the same, have that interest defined and separated by a suit for partition. That being so, I fail to see why a creditor of a father cannot similarly enforce the pious obligation of the sons by attachment and sale of their interest in the family property, even though the father had no right to alienate the same. In my judgment, the measure of the creditor's right to recover the father's debt by attachment and sale of the interest of the sons in the family properties is not the father's right to sell that interest for the payment of his debt, but is the pious obligation of the sons, which is controlled, not by the father's power to alienate that interest, but only by the conditions that the debt should not be tainted with immorality and that it can be realized only from the joint ancestral property in the hands of the son and not from his separate property. I, therefore, cannot agree with the argument that when a creditor wants to sell the interest of the sons in the family property in execution of a decree for the debt of the father, he exercises the right of the father to alienate the interest of the sons.

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I do not find any observations in the Full Bench decision of this Court in *Bankey Lal* v. *Durga Prasad* (1) which are inconsistent with the view that I have expressed above. On the contrary the following quotations from the judgment of SULAIMAN, A. C. J., with which three out of the remaining four learned

(1) 1(931) I.L.R., 53 All., 868.

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Judges constituting the Bench agreed, lend support to my view. At page 871 the learned A. C. J. is reported to have observed: "If the debt is contracted by the father, then, *whether he is the manager or not*, the courts have recognized that there is a pious obligation on his sons to pay the debt, even though the debt is a separate debt taken by the father for his own personal purpose"; and while dealing at page 883 with the decision in *Ajodhia Prasad* v. *Data Ram* (1) he observed that "we, however, went on to observe, which was in the nature of an *obiter dictum*, that as the father was not the manager the case did not come within the scope of any of the propositions laid down by their Lordships of the Privy Council in *Brij Narain* v. *Mangal Prasad*. We thought that in principle it seemed to follow that, in the absence of any express authority to the contrary, the interest of the minor grandsons could not be held liable for the personal debt of the father when the grandfather was alive and was the manager. I must confess that on a reconsideration I now think that this observation was incorrect. My learned brother YOUNG, J., concurs in this view. The propositions laid down by their Lordships of the Privy Council relate to joint families and cannot be considered as giving an exhaustive list so as to exclude the liability of a separated son." These quotations from the judgment of the learned A. C. J. put it beyond doubt that the pious obligation of the son is not dependent on the father being also the manager of the joint family.

Similarly, the following observations of the learned A. C. J. support the view that the creditor's right to enforce the pious obligation of the sons is independent and irrespective of the father's right to alienate the family property. He observed at page 872: "The liability of the sons for the payment of such debts cannot rest on the power of the manager to bind the family. It must rest solely on the pious obligation of the sons to

(1) [1931] A.L.J., 104.

pay their father's debts." And further, while dealing with the Full Bench decision of the Madras High Court in *Subramania Ayyar* v. *Sabapathy Aiyar* (1), his Lordship observed at page 876: "On the other hand, AYYANGAR, J., proceeded on the supposition that it was not the pious obligation of the Hindu son to pay his father's debt, but rather the power of the father to sell the family property in payment of his debts, which should be made the basis of the liability. The learned Judge, at page 396, gave his reasons for rejecting the contention that 'though the father's power of alienation and the creditor's right to proceed against the son's share are both based on the pious obligation of the son, still on a partition, what is put an end to is only the right of the father to alienate and not the right of the creditor.' A further reply may be that the Hindu law texts *based the liability on the pious obligation itself and not on the father's power to sell the son's share*, and that their Lordships of the Privy Council also in all their pronouncements *have put the liability on the same basis.*"

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I similarly find nothing in the judgment delivered by MUKERJI, J., in the Full Bench case to lead me to hold that the contentions advanced by the learned counsel for the appellants are well founded. It is true that at one or two places in his judgment the learned Judge has made reference to the father's right to alienate the family property for the payment of his debts that were not tainted with immorality, but he has nowhere held that the father's right to alienate the family property is co-extensive with the creditor's right to sell the son's interest in the family property in execution of a decree for such debt.

For the reasons given above I hold that the learned Judge of the court below was right in decreeing the plaintiff's suit against the defendants appellants.

(1) (1927) I.L.R., 51 Mad., 361.

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It is further argued on behalf of the appellants that the case that the appellants were under a pious obligation to pay the debt in suit was not formulated in the plaint, and, therefore, they had no opportunity to meet that case, and we are asked, therefore, to give the defendants appellants an opportunity to adduce evidence on the point. I am not at all impressed by this argument. It was, no doubt, alleged in the plaint that the debt was contracted by Raj Kumar Lal as the head and the karta of the family and that all the defendants derived benefit therefrom, but these allegations did not exclude the possibility of the defendants appellants being made liable for the payment of the debt on the basis of their pious obligation, provided the debt was not proved to have been incurred for an immoral purpose. In order to exonerate themselves from the plaintiff's claim the defendants appellants had to prove not only that the debt was not incurred for family necessity but also to prove affirmatively that it was tainted with immorality. If they did not lead any evidence on the point it was their own fault, and I am not prepared to hold that because of the absence of an express allegation in the plaint that the appellants were under a pious obligation to pay the debts the appellants have in any way been prejudiced.

The last contention of the learned counsel for the appellants was on the question of limitation. One of the five earlier bonds that formed the consideration of the bond in suit, and to which reference has been made in the inception of this judgment, was a bond dated the 17th of August, 1919, executed by Raj Kumar Lal for a sum of Rs.4,000. Raj Kumar Lal stipulated to pay the debt in four years and to pay interest on the amount every six months and the bond went on to provide that "if I fail to pay the interest in six months the said amount of interest shall be treated as principal and I shall continue to pay interest thereon at the rate aforesaid", and "in case of default in payment of interest of any six-monthly period, or the amount of principal, the creditor aforesaid has

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power to realize, in any way he likes, his entire amount . . . ." It is common ground that the default was made in the payment of interest from the very outset and it is, therefore, argued that the time for the recovery of the debt began to run from the date of the first default, and on the date that the bond in suit was executed the debt evidenced by the bond dated the 17th of August, 1919, was barred by limitation, and that any acknowledgment of that debt by Raj Kumar Lal is not binding on the defendants appellants. The learned Judge of the court below, on the authority of the Full Bench decision of this Court in *Gajadhar* v. *Jagannath* (1), overruled this contention on the ground that the sons are under a pious obligation to pay the time barred debts acknowledged by their father. Apart from the reason assigned by the learned Judge of the court below, there is another reason for not giving effect to the contention of the defendants appellants on the point. In my opinion the covenant in the bond, entitling the creditor to sue for the amount due on the bond before the expiry of the stipulated period of four years, was for the benefit of the creditor, and it was open to him to waive that option, and to wait for the full period of four years before putting the bond into suit. If the creditor waived that option, as he undoubtedly did in the present case, the bond did not become payable till after the expiry of four years and, therefore, a claim on the basis of the same would have been within time on the date that the bond in suit was executed. Their Lordships of the Privy Council in the recent case of *Lasa Din* v. *Gulab Kunwar* (2) similarly interpreted a similar stipulation in a mortgage deed giving the mortgagee an option to bring a claim for the recovery of the mortgage debt without waiting for the full term of the mortgage, and the reasons contained in the judgment of their Lordships apply with full force to the case of a simple money debt. I hold, therefore, that none of the previous debts acknowledged by Raj Kumar Lal in the bond in suit was barred by limitation.

Iqbal Ahmad, J.

(1) (1924) I.L.R., 46 All., 775. (2) (1932) I.L.R., 7 Luck., 442.

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All the contentions urged on behalf of the defendants appellants fail and accordingly I would dismiss this appeal with costs.

KISCH, J. :—I concur.

REVISIONAL CIVIL

Before Mr. Justice Niamat-ullah

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SIYA RAM DAS (PLAINTIFF) *v.* JAGANNATH AND OTHERS (DEFENDANTS)*

Oaths Act (*X of* 1873), *sections* 9, 11—*Agreement to abide by the oath of the other party to be taken in a particular form—Cannot resile from agreement—Contract Act* (*IX of* 1872), *sections* 4, 5—*Offer and acceptance—Revocation.*

The plaintiff made an offer in court, through his vakil, that if *S*, one of the defendants, made a statement on oath with Ganges water in his hand, the suit might be disposed of in accordance with that statement. The defendants' vakil accepted the offer on behalf of the defendants, including *S*, and stated that the defendants agreed to abide by the statement which *S* would make after taking oath in the proposed manner. The next day was fixed for the appearance of *S* for the purpose, but before any statement had been made the plaintiff applied to withdraw from the offer which he had made. *Held*, that the plaintiff's offer having been accepted by the other party and the acceptance having been communicated to the plaintiff, he could not thereafter revoke the offer; the agreement was a binding one, and the statement made by *S* after taking oath in the proposed manner was conclusive under section 11 of the Oaths Act.

Mr. *L. M. Roy*, for the applicant.

Mr. *I. B. Banerji*, for the opposite parties.

NIAMAT-ULLAH, J. :—This is an application in revision directed against the decree passed by the Judge of small cause court, Cawnpore, dismissing the applicant's suit for recovery of Rs.153 against the three defendants.

* Civil Revision No. 445 of 1932.

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The case was fixed for the 31st of March, 1932. It was stated on behalf of the plaintiff by his vakil that if the defendant Sheo Charan stated on oath with "Ganga jali" in his hand, the suit might be disposed of in accordance with his evidence. The defendants' vakil accepted the offer stating that the defendants (including Sheo Charan) agreed to abide by the evidence of Sheo Charan. The defendants' vakil prayed for one day's adjournment to enable him to produce Sheo Charan. Accordingly the case was adjourned to the 1st of April, 1932, when the plaintiff made an application attempting to resile from the offer to abide by the oath of Sheo Charan. The lower court, however, administered the particular kind of oath which the plaintiff had proposed on the previous day; and Sheo Charan's evidence being against the truth of the plaintiff's allegation, his suit was dismissed.

It is argued on behalf of the plaintiff that the learned Judge was in error in administering the special oath to Sheo Charan and deciding the suit in accordance with his evidence, in view of the revocation of his offer by the plaintiff. It is contended that there is nothing in law to prevent a party from revoking an offer to abide by the oath of another before the oath is actually taken. No authority has been quoted in support of this contention, which is not, in my opinion, sound. Section 8 of the Indian Oaths Act (Act X of 1873) empowers a court to administer an oath of a special kind to a person willing to take it. Section 9 provides that if any party offers to be bound by any such oath as is mentioned in section 8, if such oath is made by the other party, the court may ask such party whether or not he will make the oath. Section 10 empowers the court to administer such oath if the party to whom the offer is made signifies his willingness to make the oath. Section 11 declares that the evidence so given shall be conclusive proof of the matter stated. There can be no doubt that the offer of the plaintiff, made on the 31st of March, 1932, was forthwith

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accepted on behalf of the defendants, including the defendant Sheo Charan who was to take an oath with Ganges water in his hand. No question was raised in the court below as regards the authority of the vakils on both sides to bind their respective clients, nor has any such question been raised before me. I have, therefore, to decide the case on the assumption that the plaintiff's vakil had the authority to offer to abide by the evidence of Sheo Charan, in case he made a statement with Ganges water in his hand, and that Sheo Charan's vakil had an authority to accept that offer on his behalf. There was thus a completed agreement on the 31st of March, 1932, under which the controversy in the suit was to be settled in accordance with the evidence of Sheo Charan. It was argued by the learned counsel for the applicant that the suit could not be deemed to have been adjusted till the oath was actually made. The agreement between the parties arrived at on the 31st of March, 1932, has to be considered like any other agreement in which an offer is made on one side and acceptance on the other. Both the parties being represented by duly authorized agents, the offer made on behalf of the plaintiff was accepted there and then on behalf of the defendants, and the acceptance was complete immediately after the offer was made. It was forthwith communicated to the plaintiff's agent. The plaintiff could not, therefore, revoke his offer on the next day. Section 5 of the Indian Contract Act clearly provides that a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer but not afterwards. The communication of an acceptance is complete as against the proposer when it is put in a course of transmission to him so as to be out of the power of the acceptor (section 4). In the case before me, communication of the acceptance was complete on the 31st of March, 1932, as already mentioned; and the plaintiff's revocation next day could not affect the binding character of the agreement to have the suit decided in accordance with the evidence of the defendant Sheo

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Charan. In this view the learned Judge of the court below was right in holding the plaintiff to his offer to abide by the oath of the defendant Sheo Charan. The latter swore in the manner proposed that the plaintiff's claim was false. Such evidence was rightly treated by the lower court as conclusive.

This revision fails and is dismissed with costs.

FULL BENCH

Before Sir Lal Gopal Mukerji, Acting Chief Justice, Mr. Justice Young, and Mr. Justice King

KAPOOR CHAND AND ANOTHER *v.* SURAJ PRASAD*

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Criminal Procedure Code, sections 145(1), 537—*Omission of Magistrate to record the fact of or the grounds for his being satisfied that a dispute likely to cause a breach of peace exists—Subsequent proceedings not vitiated unless it has occasioned a failure of justice—Irregularity—Jurisdiction—Criminal Procedure Code, section* 148(3)—*Costs awarded by Magistrate by a subsequent order passed* ex parte—*Validity—Criminal Procedure Code, sections* 423(*d*) *and* 439—*Costs of revision proceedings—Authority to award such costs—"Consequential or incidental order".*

An application to take proceedings under section 145 of the Criminal Procedure Code was made to a Magistrate, who took the applicant's statement and called for a police report. On receipt of the police report he, being occupied with other work, transferred the case for disposal to another Magistrate, with the remark that judging from the police report there appeared to be some basis for the complaint. The Magistrate, to whom the case now came, perused the record and directed notice to issue to the opposite party according to law. Written statements were filed and evidence was recorded in due course, and the Magistrate ultimately passed an order directing the applicant to be put in possession of the disputed property and prohibiting the opposite party from

* Criminal Revision No. 140 of 1932, from an order of Raja Ram, First Additional Sessions Judge of Cawnpore, dated the 16th of December, 1931.

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interfering with it. Two days later, upon application by the applicant, the Magistrate passed an *ex parte* order awarding costs against the opposite party. *Held*, in revision,—

Although the Magistrate who passed the order in the case did not strictly comply with the provisions of section 145(1) of the Criminal Procedure Code inasmuch as he omitted to state in writing that he was satisfied that there was a likelihood of a breach of the peace and the grounds on which he was so satisfied, yet such omission did not deprive him of his jurisdiction but amounted only to an irregularity which was cured by section 537 of the Code, as no failure of justice was, in fact, occasioned by such omission. In the circumstances of the case there was every reason to believe, although the Magistrate did not expressly say so, that before he took any action he was satisfied in his mind, on a perusal of the police report and the sworn statement of the applicant, that there was a likelihood of a breach of the peace with respect to an immovable property.

The jurisdiction of a Magistrate to take action under section 145 of the Criminal Procedure Code arises from the fact that he has received certain information from which he is satisfied that there is a dispute likely to cause a breach of the peace. The jurisdiction of the Magistrate does not depend on how he proceeds. If he has jurisdiction, he is not deprived of jurisdiction merely because his procedure is erroneous or defective. His omission to follow certain directions contained in the Code cannot be said to deprive him of jurisdiction.

A distinction between an "illegality" and an "irregularity" should not be introduced, for the purpose of the application of section 537 of the Criminal Procedure Code. The sole criterion given by section 537 is whether the accused person has been prejudiced or not. *Subrahmania Ayyar* v. *King-Emperor* (1) discussed. *Banka Singh* v. *Gokul* (2), *Nathu Ram* v. *Emperor* (3), and *Brahmanath* v. *Sundar Nath* (4) impliedly overruled.

The order as to costs of the proceedings before the Magistrate, which was passed by him two days after his passing the order deciding the case itself, was not an illegal order. Section 148(3) of the Criminal Procedure Code does not fix any limit of time for passing the order as to costs.

(1) (1901) I.L.R., 25 Mad., 61.
(2) (1927) I.L.R., 49 All., 325.
(3) (1917) 15 A.L.J., 270.
(4) (1919) 17 A.L.J., 434.

Although section 148(3) does not expressly state that a party should have an opportunity of being heard before an order for costs is passed against him, yet, in accordance with the ordinary principles of justice, the Magistrate should not have passed the order without giving such opportunity.

Section 423(*d*) of the Criminal Procedure Code read with section 439 does not authorise the High Court to award costs of proceedings in revision before it. Clause (*d*) of section 423 authorises the appellate court to make "any consequential or incidental order that may be just or proper", but these words mean such orders as follow from or are accessary to the order passed on the appeal, and do not mean that the appellate court may pass an order as to costs of the appeal itself.

The case was first heard by a single Judge, who referred it to a larger Bench with the following referring order :—

YOUNG, J. :—This is an application in revision from the decision of the Additional Sessions Judge of Cawnpore. The applicant's application concerns an order made in proceedings under section 145 of the Code of Criminal Procedure. The Magistrate before whom the matter first came passed the following order : "There appears to be some basis for this complaint, to judge from the police report. As I am unable, owing to pressure of work, to dispose of it myself, it is transferred for such action as may be thought fit, along with a connected application, to the court of Babu Anand Sarup Saheb for disposal."

The applicant contends that this order is not in accordance with section 145 and therefore the whole proceedings are vitiated and the final order made by Babu Anand Sarup is of no effect and should be set aside. He relies upon a decision of a single Judge of this Court in *Banka Singh* v. *Gokul* (1) and also on an unreported decision of myself in *Kamla Kant Bajpai* v. *Emperor* (2). He further relies on the decision of a single Judge of this Court in *Nathu Ram* v. *Emperor* (3).

On the other hand, the respondent relies upon a two Judge decision in *Ganga Saran Singh* v. *Bhagwat Prasad* (4),

(1) (1927) I.L.R., 49 All., 325.

(2) Cr. Rev. No. 139 of 1930, decided on the 22nd of May, 1930.

(3) (1917) 15 A.L.J., 270.

(4) (1909) I.L.R., 32 All., 132.

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Musammat Har Piari v. *Nathe Lal* (1), and a Full Bench decision of the Calcutta High Court in *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (2). The cases relied upon by the applicant decided that where there is a mandatory provision in a statute it must be carried out, and if it is not, the whole proceedings are invalidated. On the other hand, the effect of the decisions relied upon by the respondent appears to be that where the "order in writing" though not in accordance with the provisions of the section is defective but no injustice has been done, then the High Court does not and should not interfere. It is suggested on the part of the applicant that a line should be drawn at the year 1923, for in that year there was an amendment of section 435 of the Code of Criminal Procedure. Before that date there was no provision for section 145 to be dealt with by way of revision in the High Court. After that date, the bar was removed. My own view is that this does not make a great deal of difference. Before 1923 the High Court did interfere in orders made under section 145, praying in aid the Government of India Act.

In my opinion there is a certain amount of confusion occasioned by these various decisions and it would be of advantage that this matter should be considered by a Bench which could lay down the law authoritatively. I therefore refer this application to the Chief Justice in order that a Bench of three Judges should be appointed to consider the matter. Although the above is the main point for decision, Mr. *Gopal Sarup Pathak* has other points on which he relies and which he wishes to argue.

The case was then heard before a Bench of three Judges.

Mr. *G. S. Pathak*, for the applicants.

Mr. *Saila Nath Mukerji*, for the opposite party.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

MUKERJI, A. C. J., YOUNG and KING, JJ.:—The matter before us arose out of a petition for revision presented by two persons, Kapoor Chand and Harish Chandra, who were dissatisfied with an order of a Magistrate passed on the 2nd of June, 1931.

The matter came up before one of us and having regard to the conflict of decisions he referred it to a

(1) (1920) 18 A.L.J., 1140. (2) (1905) I.L.R., 33 Cal., 352.

larger Bench and, accordingly, this Bench was constituted.

The facts briefly are these. One Sarju Prasad, as the servant of one Chunni Lal Garg, filed a petition under section 145 of the Criminal Procedure Code on the 21st of July, 1930, before the City Magistrate of Cawnpore, Mr. Barron. The petitioner said that his master, Chunni Lal, was in possession of a house in the city and the opposite parties (namely, the applicants before us and one Gulab Chand) were trying to interfere with the possession of his master and that there was a likelihood of a breach of the peace. The Magistrate took down the statement of Sarju Prasad on oath and directed a police inquiry into the matter. On receipt of the police report he passed the following order: "There appears to be some basis for this complaint, to judge from the police report. As I am unable, owing to pressure of work, to dispose of it myself, I transfer it for such action as may be thought fit, along with a connected application, to the court of Babu Anand Sarup Saheb for disposal." The papers were accordingly sent to Mr. Anand Sarup and he, on the 7th of August, 1930, passed an order which is recorded in the order sheet in the vernacular. It has not been translated and made a part of our typed record but the order reads as follows, if translated into English: "The record of the case has been received. It was put up before the Mukhtar of the complainant. The complainant is not present in person; on inspection of the record it is ordered that notice be issued, in accordance with law, to the opposite parties on condition of the complainant depositing the process fee. The complainant and his Mukhtar may also be informed. The Mukhtar is present and he is informed." On this order a notice was issued which professed to be one under section 145 of the Criminal Procedure Code and mentioned that section. This again has not been incorporated in our paper book and is in the vernacular.

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When translated it reads as follows: "Since I have been informed that with respect to the house No. 35/183 situated in Bengali Mohalla in the city of Cawnpore there is a serious dispute between the parties, you are hereby informed that on the 19th of August, 1930, you should appear in my court and file your reply. Till then you should not in any way interfere with the property aforesaid." Written statements were filed and evidence was recorded and Mr. Anand Sarup, as already stated, by his order dated the 2nd of June 1931, decided the matter before him. He directed that the applicant Sarju Prasad's master be put in possession of the property, his finding being that the master, Chunni Lal, had been really in peaceful possession of the property before his eviction by the opposite parties. The learned Magistrate, by this order, further forbade all disturbance with Chunni Lal's possession. The Magistrate having omitted to pass any order as to costs, an application was made by Sarju Prasad for assessment of costs and on the 4th of June, 1931, by an *ex parte* order the Magistrate assessed the costs at Rs.516-13-6 against the opposite parties.

The applicants before us went before the learned Sessions Judge with a petition of revision, but it was rejected by him; thereupon the matter came up to this Court.

Several points have been taken before us. One of these we can at once rule out, on the ground that it was not taken in the court below and was not taken specifically in this Court. As it involves a decision as to facts, we are unable to proceed with it. It is this, that Mr. Anand Sarup had no jurisdiction in the matter, because Mr. Barron had no authority to transfer the case to Mr. Anand Sarup, unless the latter was subordinate to Mr. Barron. We do not know what were the respective positions of the two Magistrates. It may be that Mr. Barron was a Sub-divisional Magistrate and that Mr. Anand Sarup was subordinate to

him under section 17(2) of the Code of Criminal Procedure. Or it may be that Mr. Barron had been specially empowered under section 192(2) to transfer cases to Mr. Anand Sarup. These are questions of fact and we cannot allow a new point to be raised in revision which involves a decision on a question of fact.

The first point that has been argued is that Mr. Barron, the City Magistrate, had no jurisdiction to transfer the case to Mr. Anand Sarup without having previously taken cognizance of the case. The argument is based on section 192 of the Code of Criminal Procedure. It is argued that a Magistrate can transfer a case only if he has taken cognizance of it, and that Mr. Barron had not taken cognizance of it. We are of opinion that Mr. Barron did take cognizance of the case inasmuch as he, on the presentation of the petition, examined the petitioner on oath, then ordered a police inquiry to be made and, on receipt of the police report, he applied his mind to the report and came to the conclusion that there was some basis for the complaint. He did not himself proceed further with the case because he was busy otherwise, but he had undoubtedly taken cognizance of the case before he transferred it.

The next point is that Mr. Anand Sarup did not proceed in accordance with law and, as he did not strictly comply with the provisions of section 145 of the Code of Criminal Procedure, he had no jurisdiction in the matter. We have already stated what orders Mr. Anand Sarup passed and what was the nature of the notice issued by him. There can be no doubt that Mr. Anand Sarup did not strictly comply with the law. He did not expressly state that he was satisfied that there was a likelihood of a breach of the peace, nor did he mention specifically the grounds on which he was so satisfied. All that he said was that he had perused the record, which, of course, included the police report

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and the statement on oath of the petitioner. He directed a notice to issue "according to law", which can only mean that it purported to be an order under section 145(1) of the Code of Criminal Procedure. Then the order which he actually issued quoted section 145 as the rule of law under which it had been issued. The order recorded the fact that the Magistrate had received information that there was a "serious dispute" between the parties. In these circumstances, although we are of opinion that the Magistrate did not follow the letter of the law, we have every reason to believe that he was satisfied in his mind, on a perusal of the police report and the sworn statement of the applicant, that there was a likelihood of a breach of the peace. Further, it appears that the opposite parties, on receipt of the notice, did raise the question as to the likelihood of a breach of the peace. The learned Magistrate expressly applied his mind to that point and, on the evidence before him, came to the conclusion that there was likelihood of a breach of the peace. In the circumstances there is reason to believe that the Magistrate was satisfied in his own mind, before he took any action, that there was a likelihood of a breach of the peace with respect to an immovable property.

Now we have to consider whether the defects in the Magistrate's order deprived him of jurisdiction to proceed with the case. In other words, we have to see whether, because the Magistrate did not strictly comply with the letter of the law in formulating his order under section 145(1), he had no jurisdiction to proceed with the case.

On this point a large number of cases have been cited and as most of the cases have been decided by learned Judges of this Court sitting singly, we do not propose to examine each and every one of them. We may also point out that many of these judgments do not consider the effect of section 537 upon defects in the order passed under section 145(1).

Section 537 of the Code of Criminal Procedure lays down that a court of appeal or a court of revision shall not reverse or alter any order passed by a court of competent jurisdiction "on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under the Code, etc." Section 537 would cure all defects, provided the court which passed the order was one of competent jurisdiction and provided that the defects did not, in fact, occasion a failure of justice.

The jurisdiction that is conferred on a Magistrate is conferred on him by the fact that he is a Magistrate and is entitled to act in a particular way in certain circumstances. In the case of the commission of an offence, he is empowered under the Code to take cognizance of the offence and to inquire into it or to try the accused person formally brought before him. In matters which do not relate to an offence but which relate to the likelihood of offences being committed, the Code provides for certain preventive measures. The Magistrate is authorised to take those measures and jurisdiction is conferred on the Magistrate by the mere fact that he is a Magistrate and it is his duty not only to try an alleged offender but also to prevent the commission of offences. If we examine certain other sections of the Code, we shall see how a Magistrate is authorised to act in order to prevent the commission of offences.

Section 106 of the Code of Criminal Procedure lays down that when a court convicts a person of an offence involving a breach of the peace, it is authorised to direct the convicted person to enter into a bond for keeping the peace for a certain period of time. Then section 107 of the Code of Criminal Procedure says that

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when a Magistrate "is informed that any person is likely to commit a breach of the peace . . . , the Magistrate . . . may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond . . . " It will be noticed that the Magistrate is to act in a certain way when he receives certain information. As soon as he receives such information he is authorised to act in a particular way. So it is the getting of the information that entitles him to act, and when he is entitled to act, he has jurisdiction to act (in the matter). Similarly, section 108 lays down that when a "Magistrate . . . has information that there is within the limits of his jurisdiction any person who . . . disseminates or attempts to disseminate . . . any seditious matter, . . . such Magistrate, if in his opinion there is sufficient ground for proceeding, may, in manner hereinafter provided, require such person to show cause . . ." Here again we find that the Magistrate, in order to act, has only to be informed of certain matters and, of course, he has to believe the information. As soon as he gets the information he is competent to act, and the Code tells him how he is to act. Similar provisions will be found in sections 109 and 110 of the Code of Criminal Procedure. Section 112 lays down the procedure for Magistrates to follow in matters detailed in sections 107, 108, 109, and 110. It says that the Magistrate should make an order in writing setting forth the substance of his information, etc. Then section 113 and the following sections tell him how he is to proceed further. Similarly, section 133 says that where a Magistrate, "on receiving a police report or other information" considers that certain public nuisances should be removed or prevented, such Magistrate may make an order. Here again it is the receipt of the information that gives the Magistrate jurisdiction to act in the matter mentioned in section 133.

Now, if we read section 145 in the light afforded by the sections quoted above, we see that if the Magistrate is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists, he is seised of jurisdiction to take action and he is empowered by the Code to act in a particular way. If this view be correct, the jurisdiction of the Magistrate arises from the fact that he has received certain information and that he is satisfied as to the truth of that information. The jurisdiction of the Magistrate *does not depend on how he proceeds*. There are two things,—one is the authority conferred on him to act and the other is how he is to act. If he has jurisdiction, he is not deprived of jurisdiction merely because his procedure is erroneous or defective.

If this view be right, the omission on the part of the Magistrate to follow certain directions contained in the Code, although some of these directions may be more important than others, cannot be said to deprive him of jurisdiction.

It was argued that the omission on the part of the Magistrate to record the fact that he was satisfied that a dispute likely to cause a breach of the peace existed, and further to record the grounds on which he was so satisfied, is an "illegality" which cannot be cured by section 537 of the Code of Criminal Procedure which deals only with irregularities and not with "illegalities".

The argument has been based on the Privy Council decision in *Subrahmania Ayyar* v. *King-Emperor* (1). In this case the accused person was charged with no less than 41 offences committed within the space of two years. Their Lordships of the Privy Council remarked as follows: "The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the

(1) (1901) I.L.R., 25 Mad., 61.

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Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission or irregularity." Their Lordships made the remark in dealing with section 537 of the Code. In a later case, however, namely, *Abdul Rahman* v. *King-Emperor* (1), their Lordships pointed out, at page 125, that in the earlier case "it was possible that it might have worked actual injustice to the accused." It may be that their Lordships of the Privy Council, in the later case, wanted to point out that section 537 of the Code of Criminal Procedure could not cure the defect in *Subrahmania Ayyar's* case because the Code contained the provision that an irregularity, which had worked injustice to the accused, could not be cured. But it is significant that although their Lordships of the Privy Council drew a distinction between "illegality" and an "irregularity" in the earlier case, which was decided in the year 1901, the legislature did not introduce the word "illegality" in section 537 or anywhere else in the Code, although it was amended after that year. This being the state of the law, we do not think that we should introduce a distinction between "illegality" and "irregularity". The sole criterion given by section 537 is whether the accused person has been prejudiced or not. The object of procedure is to enable the court to do justice, but, if in spite of even a total disregard of the rules of procedure, justice has been done, there would exist no necessity for setting aside the final order, which is just and correct, simply because the procedure adopted was wrong.

Having regard to the conclusion at which we have arrived, it is not necessary for us to examine many of the cases that have been decided in this Court. It would be sufficient for us to mention that some learned single Judges, in *Banka Singh* v. *Gokul* (2) and

(1) (1926) 25 A.L.J., 117.

(2) (1927) I.L.R., 49 All., 325.

Brahmanath v. *Sundar Nath* (1), took the view that the omission to make the order in conformity with section 145 of the Code of Criminal Procedure amounted to an illegality and ousted the jurisdiction of the Magistrate and the order, good or bad, must be set aside. A contrary view was taken by two learned Judges of this Court in *Ganga Saran Singh* v. *Bhagwat Prasad* (2); by a learned single Judge of this Court in *Madan Mohan Lal* v. *Sheoraj Kunwar* (3); and by two learned Judges of this Court in *Emperor* v. *Barmha Singh* (4). As we have said, in view of the fact that the rulings quoted before us were mostly decisions of learned single Judges, and having regard to the fact that we have tried to arrive at some principle on which to base our decision, we need not examine the cases expressing the opposite view.

We have repeatedly asked Mr. *Pathak*, the learned counsel who ably argued the case for the applicants, if he could tell us how his clients were prejudiced by the omission on the part of the Magistrate to comply strictly with the provisions of sub-section (1) of section 145 of the Code of Criminal Procedure. He replied that he was not in a position to say that his clients had been prejudiced. In view of this admission and in view of the fact that we ourselves are not in a position to discover that the applicants have in any way been prejudiced by the said omission, we are of opinion that the irregularity committed by the Magistrate is cured by section 537 of the Code of Criminal Procedure.

The next point that was urged was that the Magistrate was wrong in awarding costs to the opposite party, two days after he had passed his orders on the main application. The question of costs is dealt with by section 148(3), which does not fix any limit of time for passing the order as to costs. All that is needed is that the Magistrate passing the decision should

(1) (1919) 17 A.L.J., 434.
(2) (1909) I.L.R., 32 All., 132.
(3) [1932] A.L.J., 503.
(4) (1932) I.L.R., 54 All., 1002.

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make an order as to costs. This being the case, we are not in a position to say that the order that was passed as to costs two days after the decision of the main case was an illegal order. This view is in accordance with the decision in the case of *Nafar Chandra Pal* v. *Siddhartha Krishna* (1).

Next it was objected that the order as to costs was passed *ex parte*. Although section 148(3) does not expressly state that a party should have an opportunity of being heard before an order for costs is passed against him, and the Magistrate, therefore, cannot be held guilty of an "irregularity", we agree that, in accordance with the ordinary principles of justice, the Magistrate should not have passed the order without giving the applicant an opportunity of showing cause against granting the opposite party's application. We see no reason, however, to interfere, as the learned Sessions Judge has considered the order upon its merits and has come to the conclusion that, having regard to the fact that the case dragged on for about a year, the amount of costs was not unfair.

On behalf of the opposite parties we have been asked to award them costs of the proceedings before us and as an authority a decision of a learned single Judge of this Court in *Panna Lal* v. *King-Emperor* (2) has been cited. Against this decision, which followed a two Judge decision of the Bombay High Court, is the decision of the Full Bench case of *Veerappa Naidu* v. *Avudayammal* (3) which, in its turn, purported to follow a Calcutta case, *Mehi Singh* v. *Mangal Khandu* (4). The learned counsel for the opposite party also cites *Maung Po Lon* v. *Maung Ba On* (5).

We have given the matter our independent consideration and we are of opinion that section 423, clause (*d*),

(1) (1920) I.L.R., 47 Cal., 974.
(2) Cr. Rev, No. 221 of 1931, decided on the 13th of July, 1932.
(3) (1924) I.L.R. 48 Mad., 262.
(4) (1911) I.L.R., 39 Cal., 157.
(5) A.I.R., 1925 Rang., 111.

of the Code of Criminal Procedure read with section 439 does not authorise the High Court, in revision, to award costs of the proceedings before it. Clause (*d*) of section 423 authorises the appellate court "to make any amendment or any consequential or incidental order that may be just or proper". The words under quotation mean that the appellate court may amend the order appealed from and may, further, pass such orders that follow from or are accessary to the order passed. They do not mean that the appellate court may pass any order as to costs of the appeal itself. We are of opinion that no costs can be awarded to the opposite party.

In the result the application fails and is hereby dismissed.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, Mr. Justice King, and Mr. Justice Niamat-ullah

MOOLCHAND MOTILAL (DEFENDANT) *v.* RAM KISHEN AND OTHERS (PLAINTIFFS)*

1933 *January*, 5

Valuation of suit—Suit under order XXI, rule 63—Suit for declaration of ownership of property and its non-liability to be sold in execution of a decree against another person—Valuation according to decretal amount sought to be realized, or the value of the property, whichever less—Suits Valuation Act (VII of 1887), section 11—Under-valuation—Suit decided by court of inferior jurisdiction—Whether disposal on the merits prejudicially affected thereby—Estoppel—Plaintiff urging in appellate court that suit being undervalued was tried by wrong court.

A suit for a declaration that the plaintiffs were the owners of certain immovable properties and that these properties were not liable to be attached and sold in execution of a decree obtained by defendant No. 1 against defendant No. 2 was valued at Rs.1,342 and was accordingly filed in the court of the Munsif. This amount was the balance remaining due on the decree in execution of which the properties had been attached. Nothing was mentioned about the

*First Appeal No. 164 of 1931, from an order of Brij Behari Lal, Subordinate Judge of Etawah, dated the 11th of August, 1931.

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value of the properties, nor did the defendants raise any plea that the suit was undervalued and should have been filed in the court of the Subordinate Judge. The judgment-debtor, defendant No. 2, did not enter appearance. The suit was dismissed on the merits and the plaintiffs appealed, and in the appellate court they raised the plea that the property in question was worth Rs.20,000, the suit had been undervalued and the Munsif had no jurisdiction to try it. The appellate court found in favour of this plea and returned the plaint for presentation to the proper court. On appeal to the High Court—

Held, that in a suit like the present it is the amount of the decree sought to be realized that determines the value of the suit, where the property involved is of larger value than the amount due under the decree; but where the decretal amount is large and the market value of the property involved is smaller, it is the market value of the property that determines the value of the suit. The fact that the judgment-debtor is also impleaded in the suit, as in most cases he is impleaded *pro forma*, makes no difference in the rule. *Dwarka Das* v. *Kameshar Prasad*, I. L. R., 17 All., 69, not approved. In the present case the suit had been properly valued and filed in the proper court.

Held, also, that the mere fact that a court of inferior jurisdiction has taken cognizance of a suit on account of undervaluation is not, in itself, a ground for saying that the disposal of the suit on the merits has been prejudicially affected, within the meaning of section 11 of the Suits Valuation Act. Having regard to the object for which section 11 was enacted, the conclusion is clear that the mere fact that there has been an undervaluation, and therefore the case has been heard by a court which should not ordinarily have heard it, should not be allowed to affect the decree if there has been no prejudice in the proper trial of the case on the merits.

Held, also, that no question of estoppel against the plaintiffs arose in this case. The plaintiffs did not say in the plaint that the property involved was worth Rs.1,342. They valued their suit at that figure, which was the amount due on the decree. It was a pure question of law whether the valuation of the suit should be the market value of the property or the amount due on the decree, and there could be

no estoppel on a question of law. Accordingly, the plaintiffs were not estopped from pleading in the appellate court that the true valuation of the suit was the market value of the property.

This appeal was first heard by a Division Bench, which referred it to a Full Bench with the following referring order :—

MEARS, C. J., and KING, J. :—This appeal arises out of a suit brought for a declaration that the plaintiff is the owner of the property in suit and it is not liable to be attached and sold in execution of a decree in favour of the defendant No. 1 against the defendant No. 2. The plaintiff valued the claim for the purposes of jurisdiction at Rs.1,342, and paid Rs.10 as court fees for the declaratory relief. There was no suggestion in the plaint that the value of the property was more than the amount mentioned. It does, however, appear that the sum of Rs.1,342 represented the balance of the decretal amount which was still outstanding and which was sought to be realised in execution. In the written statement neither of the defendants raised the plea that the claim had been undervalued and was not triable by the Munsif in whose court it had been filed. There was no issue framed by the trial court as regards the valuation of the subject-matter of the claim. The learned Munsif went into the question on the merits and dismissed the suit. He, however, mentioned that the enclosure in dispute was a valuable building of Rs.20,000. This was apparently based on the statement made by some witness who was examined in the case.

The plaintiff appealed to the court of the District Judge, and himself raised the point that the trial court had no jurisdiction because the value of the property in suit exceeded its pecuniary jurisdiction. The appellate court went into this question and recorded a finding that the property was worth much more than Rs.2,000, and that therefore the Munsif should not have tried the suit. He accordingly allowed the appeal and ordered the plaint to be returned for presentation to the proper court. The defendant has accordingly come up in appeal to this Court and contends that the order of the appellate court is wrong.

Several important questions of law arise in this case. It is to be seen whether the plaintiff, who himself valued the claim at less than Rs.2,000 and chose the forum, can be

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allowed to complain that the suit has been prejudicially affected on its merits by trial in the Munsif's court. Another point for consideration is whether the plaintiff had correctly valued his claim at Rs.1,342, which was the outstanding amount of the decree. A subsidiary question may arise whether in claiming a declaration of title as against the defendant No. 2 also the plaintiff was bound to value his claim at the full market value of the property.

On the question whether the mere fact—that the suit has been tried by a Munsif, with the necessary result that the appeal has been entertained by the District Judge, whereas if it had been tried by the Subordinate Judge an appeal would have lain to the High Court—is in itself sufficient to bring the case within section 11 of the Suits Valuation Act, the Lahore High Court in *Cheloo* v. *Kali Das* (1) has gone to the extreme length of holding that whenever there is an undervaluation and a case is tried by a Munsif instead of a Subordinate Judge, there is a prejudice within the meaning of the section. On the other hand a Full Bench of the Madras High Court in *Kelu Achan* v. *Cheriya Parvathi Nethiar* (2) has held that the circumstance that the appeal has ultimately to be heard by a District Judge and not by a Bench of the High Court does not involve the prejudice contemplated by the section. This case has, however, been dissented from by the Patna High Court in *Mahanth Rukmin Das* v. *Deva Singh* (3), and by the Oudh Court in *Sheoraj Singh* v. *Phulbasa Kuer* (4). We may point out that the point directly arose before a single Judge of this Court in *Musa Imran* v. *Bhagwan Das* (5), and the learned Judge has expressed a definite opinion in favour of the appellant.

We think that this case raises questions of such importance that the conflict requires to be set at rest by a Full Bench. We accordingly direct that the case be laid before the Chief Justice for the constitution of a Full Bench.

The case was then heard by a Full Bench.

Messrs. *Shiva Prasad Sinha* and *Nanak Chand*, for the appellants.

Messrs. *N. P. Asthana* and *B. N. Sahai*, for the respondents.

(1) (1917) 44 Indian Cases, 816.
(2) (1923) I.L.R., 46 Mad., 631.
(3) (1926) I.L.R., 5 Pat., 505.
(4) A.I.R., 1925 Oudh, 561.
(5) (1927) 100 Indian Cases, 546.

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MUKERJI, A. C. J., KING and NIAMAT-ULLAH, JJ. :—
This appeal has been referred to a Full Bench because it raises several difficult points of law.

The facts of the case briefly are these. The appellants before us obtained a simple money decree against one Lalman. In execution of the decree the appellants caused the attachment of certain immovable properties. The respondents Nos. 1 and 2 preferred an objection to the attachment on the ground that one half of one of the properties and a whole shop belonged to themselves and, not being the property of the judgment-debtor, had been improperly attached. Their objection failed in the execution department and thereupon they instituted the suit, out of which this appeal has arisen, to obtain a declaration that the property, the attachment of which had been objected to, was their own property and could not be attached and sold in execution of the decree obtained against Lalman. To this suit, not only were the decree-holders made parties but also Lalman was impleaded.

Lalman did not enter appearance. The decree-holders defended the suit. The suit was heard on the merits by the learned Munsif, it having been valued at Rs.1,342 which was the amount then due on the decree in execution against Lalman. The plaintiffs who lost their suit went to the court of the District Judge and there urged that the property involved in the suit was really worth Rs.20,000 and the Munsif had no jurisdiction to hear the suit. The learned Subordinate Judge who heard the appeal was of opinion that the fact that a suit of large valuation had been heard by a Munsif was in itself a ground for holding that the plaintiffs had been prejudiced by the trial. The learned Subordinate Judge accordingly reversed the decree of the first court and directed that the plaint be returned to the plaintiffs for presentation to the proper court. Against this order this first appeal from order has been filed.

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The questions that were raised during the hearing of the appeal before a Division Bench may be framed as follows: (1) What, in the circumstances of the case, would be the true valuation of the suit? (2) If the valuation be larger than the pecuniary jurisdiction of the Munsif, whether section 11 of the Suits Valuation Act (Act VII of 1887) precluded the lower appellate court from interfering with the decree except on the ground of the disposal of the suit on the merits being prejudicially affected? and (3) Whether the plaintiffs were estopped from pleading that the true valuation of the suit was more than the value put by them in the plaint?

We take the several points raised one after another.

On the first point, namely the true valuation, the cases decided in this Court have almost uniformly taken the view that it is the amount of the decree that determines the value of the suit, where the property involved is of larger value than the amount due under the decree. These cases further lay down that where the decretal amount is large, but the market value of the property involved is smaller, it is the market value of the property that determines the value of the suit. One of these cases is *Khetra* v. *Mumtaz Begam* (1), which followed the opinion expressed by their Lordships of the Privy Council in *Radha Kunwar* v. *Reoti Singh* (2) and another Privy Council case in *Phul Kumari* v. *Ghanshyam Misra* (3). A still later case is *Anandi Kunwar* v. *Ram Niranjan Das* (4). These cases lay down the propositions of law in the manner stated above.

There is an earlier case in *Dwarka Das* v. *Kameshar Prasad* (5) where it was mentioned that in a similar suit, if the judgment-debtor be made a party, the value of the property claimed would determine the value of

(1) (1915) I.L.R., 38 All., 72.
(2) (1916) I.L.R., 38 All., 488.
(3) (1907) I.L.R., 35 Cal., 202.
(4) (1918) I.L.R., 40 All., 505.
(5) (1894) I.L.R., 17. All., 69.

the suit. This view, however, has not been maintained in the two later cases quoted above, on the ground that in most of the cases the judgment-debtor would be a party *pro forma* and not as a person disputing the claim of the plaintiffs. At page 74 of the report in *Khetra* v. *Mumtaz Begam* (1) their Lordships say: "No doubt she (the plaintiff) made her husband a party to the suit, but she asked for no relief against him and did not allege any cause of action which would entitle her to sue him. Apparently her husband was only made a formal defendant to the suit." A further reason is given at the same page as follows: "The whole of the property is not in dispute, and under the attachment and the sale which might take place in pursuance of it the whole property cannot be sold, but only so much of it as will be sufficient for the realisation of the amount of the decree. Therefore, the value of the subject-matter of the suit is the amount of the decree and not the amount of the actual value of the property or the value for which the plaintiff alleges that she purchased it." We entirely agree with the view taken in the cases cited above and are of opinion that the valuation would depend on the circumstances stated above and not on the actual value of the property where the decretal amount to be realised is less than the market value of the property claimed. In this view, the proper valuation is Rs.1,342 as stated in the plaint.

On the second question again, the decisions in this Court have been uniform. The earliest case that was placed before us on this point is *Kishan Lal* v. *Rup Chand* (2). The other cases are: *Dalip Singh* v. *Kundan Singh* (3), *Khudaijat-ul-Kubra* v. *Amina Khatun* (4) and *Musa Imran* v. *Bhagwan Das* (5). The view taken in this Court has been followed by the Madras High Court in *Kelu Achan* v. *Cheriya Parvathi Nethiar* (6).

(1) (1915) I.L.R., 38 All., 72.
(2) Weekly Notes 1889, p. 169.
(3) (1913) I.L.R., 36 All., 58.
(4) (1923) I.L.R., 46 All., 250.
(5) (1927) 100 Indian Cases, 546.
(6) (1923) I.L.R., 46 Mad., 631.

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In Lahore the opinion seems to be in conflict. While Mr. Justice ABDUL QADIR has taken the same view as this Court in *Sardarni Hamir Kaur* v. *Court of Wards* (1), Mr. Justice BROADWAY has taken a contrary view in *Cheloo* v. *Kali Das* (2). The Patna view is contrary to the view taken by us, *vide Mahanth Rukmin Das* v. *Deva Singh* (3), and Oudh has followed the Patna view in *Sheoraj Singh* v. *Phulbasa Kuer* (4).

In view of the opinion expressed by other High Courts we have reconsidered the question on the merits and have arrived at the conclusion that the view taken in this Court is the correct view.

Section 11 of the Suits Valuation Act starts by quoting section 578 of the Code of Civil Procedure of 1882, which has now been replaced by section 99 of the Code of Civil Procedure of 1908. These sections lay down that "No decree shall be reversed or substantially varied . . . in appeal on account of any . . . error, defect or irregularity . . . not affecting the merits of the case or the jurisdiction of the court." As jurisdiction of the court is specifically exempted from the operation of the rule contained in these two sections, section 11 lays down that, notwithstanding the provision contained in these sections, the overvaluation or undervaluation of a suit or appeal shall not affect a decree of the court of first instance or of a lower appellate court, unless certain conditions stated in the section are fulfilled. The important point is that the decree passed shall not be interfered with unless the overvaluation or undervaluation "has prejudicially affected the disposal of the suit or appeal on its merits".

The question is whether the mere fact that a court of inferior jurisdiction has taken cognizance of the suit on account of undervaluation is in itself a ground for saying that the disposal of the suit on the merits

(1) (1932) 138 Indian Cases, 62.
(2) (1917) 44 Indian Cases, 816.
(3) (1926) I.L.R., 5 Pat., 505.
(4) A.I.R., 1925 Oudh, 561.

has been prejudicially affected. We are of opinion that any such argument would not be good in view of the fact that section 11 aims directly at nullifying any such argument. The legislature thought it fit to create two grades of courts of original jurisdiction and two grades of courts of appellate jurisdiction. The jurisdiction of these courts depends on the valuation of the suit or appeal. Disputes as to the proper court to choose for the suit or the appeal are likely to arise and the legislature which created these various courts thought that it was proper for it to settle the dispute in certain cases. It accordingly enacted, as we read section 11, that the mere fact that there has been an undervaluation and therefore the case has been heard by a court which should not ordinarily have heard it, shall not be allowed to affect the decree if there has been no prejudice in the proper trial of the case. If we put the object for which section 11 was enacted before us, we come at once to the conclusion that the fact that a court of inferior jurisdiction has heard a suit of larger value should not be allowed to be an exception to the rule enacted in section 11.

The overvaluation and undervaluation have been put in the same category and in the same sentence. The prejudice contemplated must be or may be of the same nature. If it is argued that the hearing of a suit by a court of inferior jurisdiction itself operates as a prejudice, then it cannot be said that the hearing of a suit of smaller value by a court of higher jurisdiction can, in itself, operate as a prejudice on the merits.

Some difficulty has been experienced in finding an illustration where an undervaluation of a suit or appeal is likely to prejudice the disposal of a case and difficulty has also been experienced in finding an illustration where the overvaluation of a suit or appeal may affect prejudicially the disposal of a case on the merits. We have been able to hit upon two instance, one of each case, and they are these. In the case of overvaluation,

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if a property which should have been valued at say Rs.2,000 is valued at Rs.11,000 and the suit is brought before a Subordinate Judge, a first appeal would lie to the High Court against the decision. The maintenance of an appeal in the High Court is a costly matter. The record has to be translated and printed and it is possible that a party with small resources may not be able to prosecute properly an appeal in the High Court. In the case of an appeal to the Privy Council from the decision of a High Court, a party may point out that from poverty he could not print the proper documents for the benefit of the High Court and therefore the disposal has suffered prejudicially on the merits.

In the case of undervaluation this illustration may do. Suppose the market value of a piece of jewellery is really Rs.1,500. A party claims it and, valuing it at Rs.500, brings the suit in the court of small causes. If the right valuation had been given, the suit would have been cognizable by a Munsif and the party who lost would be entitled to file an appeal. When the suit is decided, it would be open to the High Court in revision to find out whether the disposal of the suit on the merits has been prejudicially affected. A party may show that his evidence was taken piecemeal, that the whole of the evidence was not recorded *in extenso* and the result was that the Judge, not remembering fully what the witnesses had stated at an earlier stage, arrived at a conclusion which was not the right one.

It is really immaterial whether we are able or not to give proper illustrations of the disposal of a suit or appeal being prejudicially affected by undervaluation or overvaluation. Suffice it to say that the language of the law is clear and the necessary consequence of that language has to be followed if there be no ambiguity. The law lays down that the mere fact that a suit has been overvalued or undervalued shall not be allowed to affect the decree unless the disposal of the

suit on the merits has been prejudicially affected owing to the overvaluation or undervaluation. The learned Subordinate Judge who heard the appeal has not come to the conclusion that owing to undervaluation the disposal of the suit has been prejudicially affected on the merits. In the circumstances, we are of opinion that it was not open to him to interfere with the decree of the court of first instance.

The third point is one of estoppel. In this case no question of estoppel can arise. The value of the property was known to the parties. The plaintiffs did not say in the plaint that the property claimed was worth Rs.1,342. They distinctly stated that they valued their suit according to the amount due to the decree-holders from Lalman. It was a pure question of law whether the valuation of the suit should be the market value of the property or the amount due from Lalman. There can be no estoppel on a question of law. We accordingly hold that the plaintiffs were not estopped from pleading before the Subordinate Judge that the true valuation of the suit was the market value of the property in dispute. We have, however, held that the plaintiffs properly valued their suit.

The result is that the appeal succeeds. We set aside the order returning the plaint for presentation to the proper court and direct the learned Subordinate Judge to hear the appeal on the merits. The appellants will have their costs of both the hearings in this Court, at all events.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, Mr. Justice King and Mr. Justice Niamat-ullah

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January, 10

SITAL DIN AND OTHERS (DEFENDANTS) *v.* ANANT RAM (PLAINTIFF)*

Letters Patent, sections 10, 30—*"Judgment"—Order of remand—Appeal—Civil Procedure Code, section* 148: *order XLI, rule* 23—*Conditional order of remand, fixing a time for fulfilling the condition and in default the appeal to stand dismissed—Decree or order—Power to extend the time.*

An appeal lies under section 10 of the Letters Patent from an order of remand passed by a single Judge of the High Court under order XLI, rule 23 of the Civil Procedure Code. A final decision which effectually disposes of the appeal amounts to a "judgment" within the meaning of section 10 of the Letters Patent, whether it amounts to a "decree" or not. *Sevak Jeranchod Bhogilal v. Dakore Temple Committee*, 23 A. L. J., 555, explained and distinguished.

Where the lower appellate court remanded the suit on condition that the appellant should within one month file certain papers in the trial court, "and in case that is not done, the remand order shall not take effect and the appeal shall stand dismissed automatically upon a report being made by the court below that the order for filing the papers had not been complied with", and the condition was not complied with but an extension of time was prayed for, it was *held* that the order was not final and did not amount to a decree, and it was open to the court to extend the time.

The facts of the case are fully set forth in the following judgment of the single Judge from which the appeal under section 10 of the Letters Patent was filed :—

KENDALL, J. :—The plaintiff appellant brought a suit for demolition of the constructions on a certain plot. The suit was dismissed by the trial court, and on the plaintiff appealing to the District Judge an order was passed remanding the suit for re-trial, provided that within one month the plaintiff filed certain papers; "and in case that is not done," the order concludes, "the remand order shall not take effect and the appeal shall stand dismissed automatically." The

* Appeal No. 47 of 1931, under section 10 of the Letters Patent.

papers were not filed within the time given, and the plaintiff made an application for an extension of time. The Judge refused, saying that he had neither the power nor the wish to extend time, but held that the language of the order passed on appeal by himself was peremptory and left him no choice. He therefore dismissed the application, adding "The appeal stands dismissed automatically, requiring no further order of the appellate court."

An appeal has been preferred against this order, and a preliminary objection is raised on behalf of the respondents that no appeal lies from this order of the District Judge, which is merely an order refusing to extend time and has not the force of a decree. It is argued that the first order had the effect of a decree, and in fact was embodied in a decree, and as such was appealable, but that the second order was merely one refusing extension of time; and further that the Judge was, as he believed himself to be, bound by the decree which he had himself given.

It is argued on behalf of the appellant that the first order was an order of remand not amounting to a decree, and that it was the second order which had the force of a decree and which was subject to an appeal.

Counsel on either side have referred to the decisions in the cases of *Suranjan Singh* v. *Ram Bahal Lal* (1) and *Jagarnath Sahi* v. *Kamta Prasad Upadhya* (2). In the first of these cases a Full Bench of this Court held that section 148 of the Code of Civil Procedure does not entitle the court to extend the time fixed by the decree for payment of the purchase money in pre-emption suits and further that an order made under section 148 of the Code of Civil Procedure is not a decree, and that it is not appealable as an order under section 104 of the Code of Civil Procedure. In the second case a Bench of two Judges of this Court held that where an application had been made to set aside an *ex parte* decree, and the court passed an order in favour of the applicants conditional on their paying to the plaintiffs by a certain date a sum of money as damages, an appeal would lie from the order of the court refusing to receive the prescribed payment after the fixed date, and also that the court had jurisdiction to extend the time. The *ratio decidendi* in both cases clearly was whether the first order fixing the time for payment had the effect of a decree or not. In the case

(1) (1913) I.L.R., 35 All., 582. (2) (1913) I.L.R., 36 All., 77.

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before the Full Bench there was a decree for pre-emption and a time was fixed for payment of the purchase money. In the second case there was an order setting aside the *ex parte* decree conditional on payment being made within a fixed time. In the case before me now it is clear that the learned District Judge believed that the first order had the force of a decree, and that it was not an order of remand as the appellant claims that it was. It could, it is argued, only be changed into an order of remand if the plaintiff filed certain papers before a certain date. Like the order of the Subordinate Judge in the case of *Jagarnath Sahi* v. *Kamta Prasad Upadhya* (1) it is, however, open to criticism as a conditional order. If the District Judge had ordered the papers to be filed by a certain date and the appeal to be put up for final orders on that date there would have been no ambiguity. Under section 2 of the Code of Civil Procedure a decree is defined as "The formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." The present case is not analogous to that of a preliminary decree in a mortgage suit or in a partition suit where the rights have been determined and only accounting remains. If the papers had been filed by the plaintiff in time the whole matter would have been re-opened, so that it cannot be said that the rights of the parties had been conclusively determined. This being so, it appears to me that the first order of the District Judge did not amount to a decree, and in consequence it was open to him to give further time. He did not wish to do so, though I am informed that the plaintiff was ready with the papers only one day after the allotted date. He has not, however, discussed the merits of the case as he would have done if he had believed himself competent to extend time. I therefore allow the appeal, remand the case under order XLI, rule 23 of the Code of Civil Procedure and direct the lower appellate court to re-admit the appeal under its original number and to determine on its merits the question of whether the plaintiff should be allowed an extension of time, and, if the answer to this question is in the affirmative, to remand the suit in accordance with the order of the 18th of January, 1929.

The appeal under section 10 of the Letters Patent from this judgment was heard by a Full Bench.

(1) (1913) I.L.R.. 36 All., 77.

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Mr. *B. Mukerji*, for the appellants.

Mr. *Shiva Prasad Sinha*, for the respondent.

MUKERJI, A. C. J., KING and NIAMAT-ULLAH, JJ. :— This is a Letters Patent appeal against the judgment of a learned single Judge of this Court. A preliminary point is taken that no appeal lay. The ground urged is that the order passed by the learned single Judge did not amount to a decree, inasmuch as he sent back the case to the lower appellate court under order XLI, rule 23 of the Code of Civil Procedure. It is pointed out that the order passed was an order of remand, and under the Code of Civil Procedure it did not amount to a "decree".

In support of this argument reliance is placed on the case of *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (1), decided by their Lordships of the Privy Council. That case arose in the following circumstances. There was a temple of a public character, and a suit under section 92 of the Code of Civil Procedure was filed in respect of the management of the temple. The case went up before their Lordships of the Privy Council, and their Lordships confirmed the scheme settled in India after some alterations. One of the provisions in the scheme was that the scheme might "be altered, modified or added to by an application to His Majesty's High Court of Judicature at Bombay". A temple committee was appointed, and it framed a body of rules according to the powers given to it. These rules came before the District Judge of Ahmedabad for his sanction, and he made certain alterations. Thereupon certain persons, who were dissatisfied with the alterations made by the District Judge, filed an appeal against the order. The High Court held some doubt as to whether an appeal lay; but nevertheless a learned Judge of the High Court "wrote and delivered a judgment in which he expressed his views as to the rules which had

(1) (1925) 23 A.L.J., 555.

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been sanctioned by the District Judge''. Then an appeal was taken to His Majesty in Council, and the Judicial Committee expressed the opinion that no appeal lay to the High Court and no appeal lay to the Privy Council. In pointing out the reason as to why no appeal lay to the Privy Council, their Lordships said as follows : ''The term 'judgment' in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense.'' Reliance is placed on this sentence, and it is urged that for an appeal to lie against the ''judgment'' of a single Judge the ''judgment'' must amount to a decree.

In our opinion this is not a correct reading of the judgment of their Lordships of the Privy Council. Although the judgment does not point out upon what clause of the Letters Patent of the Bombay High Court the remark was based, yet it seems to us that their Lordships had in their minds clause 39 of the Letters Patent of the Bombay High Court, which laid down the conditions under which an appeal could lie from a ''judgment'' of the Bombay High Court. It is true that clause 15 of the Letters Patent of that Court also mentions that in certain cases an appeal would lie to His Majesty; but that clause primarily mentions in what cases an appeal lies from a decision of one or more Judges of the High Court to the High Court itself, and then concludes by saying that in other cases an appeal would lie to His Majesty. It is really clause 39 which states in detail the circumstances in which an appeal would be competent to His Majesty in Council. There, not only the words ''final judgment'' are used, but also the words ''decree'' and ''order''. In clause 15 the only word used is judgment. We, therefore, think that when their Lordships of the Judicial Committee said that in order that an appeal might lie from a judgment of the High Court it should amount to a decree, they had clause 39 in their minds.

We have to construe clause 10 of the Letters Patent of the Allahabad High Court, which is almost verbatim the same as clause 15 of the Letters Patent of the Bombay, Madras and Calcutta High Courts. If the appeal to His Majesty in Council is not confined to a decree alone, but if an order which is final is appealable to His Majesty in Council, and if the words "decree" and "order" appear in the same sentence as the word "judgment", we see no reason why we should read the word "judgment" in clause 10 of the Allahabad Letters Patent or clause 15 of the Letters Patent of the Bombay, Madras and Calcutta High Courts as meaning only a "decree" and not also a final "order". On a reading of several clauses of the Letters Patent of the Allahabad Court we have come to the conclusion that a final decision, which effectually disposes of the appeal before the High Court, should amount to a judgment, whether it amounts to a decree or not. If it does not amount to a decree, it would amount to an "order" in any case; and as we have already said, a final decree or order of the High Court is appealable to His Majesty under clause 39 of the Letters Patents of the Bombay, Madras and Calcutta High Courts and clause 30 of the Letters Patent of the Allahabad High Court, and there would be no valid reason to read the word "judgment" in clause 10 of the Letters Patent of the Allahabad Court in a restricted sense.

We may point out that the practice of this Court has always been to entertain an appeal against an order of remand passed by a single Judge of this Court under order XLI, rule 23 of the Code of Civil Procedure. This was pointed out in the case of *Ishwari Prasad* v. *Sheotahal Rai* (1), to which one of us was a party. In that case also the decision of their Lordships of the Privy Council in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (2) was cited, but it was distinguished. It was stated in that judgment that nothing

(1) (1926) I.L.R., 48 All., 684. (2) (1925) 23 A.L.J., 555.

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had been shown to the Judges who decided the case, which ought to induce them to differ from the existing practice. We are of opinion that nothing has been shown to us which ought to induce us to differ from the existing practice.

The opinions in the other High Courts seem to support, in the main, the view taken by us. Cases decided before the decision of their Lordships of the Privy Council need not be considered. The Lahore High Court in *Shibba Mal* v. *Rup Narain* (1) had before them a question similar to the one before us, and they came to the conclusion that an appeal was maintainable under the Letters Patent of the Lahore High Court, clause 10 of which is similar in terms to clause 10 of our Letters Patent.

We hold, therefore, that the appeal is maintainable. Now we have to come to the merits of the case.

The facts of the case are given in the judgment of the learned single Judge, and we need not state them again. The difficulty in the case arose from the fact that the learned District Judge added the word "automatically" when revising his judgment. The judgment, as it stands, is somewhat ambiguous. The sentence by which the learned Judge made a remand to the court below runs as follows: "Accordingly I direct that the suit shall go back to the lower court for retrial on condition that within one month from today the plaintiff appellant shall place on the record all the papers that may be necessary for measurements being carried out from a 'sahadda', and in case that is not done, the remand order shall not take effect and the appeal shall stand dismissed automatically upon a report being made by the court below that the order of this court for filing papers had not been complied with."

It appears that some papers were filed in the court of first instance within the period allowed but some were filed beyond the month allowed. The learned Munsif refused to take the papers and made a report that the order

(1) (1928) I.L.R., 10 Lah., 132.

of the appellate court had not been complied with. An application was also made by the plaintiff to the lower appellate court to accept the documents he had brought. The learned Judge thought that the order of remand being a final order of the court, the time given by him by that order could not be extended by him under section 148 of the Code of Civil Procedure. He also said that even if he could extend the time, he did not wish to extend it. The learned single Judge of this Court was of opinion that the order was not final and time could have been extended if the learned District Judge was inclined to extend the period. We agree with the view taken by the learned single Judge of this Court. What the learned District Judge meant when he said "the appeal shall stand dismissed automatically upon a report being made . . . " was that he was passing a sort of a stop order, and at that moment he was not inclined to grant any further time to the plaintiff. The word "automatically" and the expression "upon a report being made" are somewhat contradictory. If the final order depended on receipt of a report from the court of first instance, it cannot be said that the order of the learned District Judge became operative, *by its own force*, without any report being received from the lower court.

Agreeing, therefore, with the learned single Judge of this Court we dismiss the appeal with costs.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, Mr. Justice King and Mr. Justice Niamat-ullah

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MOHI-UDDIN (JUDGMENT-DEBTOR) *v.* KASHMIRO BIBI (DECREE-HOLDER)*

Civil Procedure Code, order XXIII, rule 3—Compromise decree —"Lawful" compromise—Stipulation by way of penalty contained in compromise—Contract Act (IX of 1872), section 74—Applicability to compromise decree—Civil Procedure Code, section 47—Execution court can modify penal clause contained in compromise decree.

A decree was passed, in accordance with the terms of a compromise, which provided that the defendant was to pay Rs.11,500 by yearly instalments of Rs.1,100, but that in case of default in payment of any one instalment the entire amount remaining unpaid would become immediately payable, with interest at the rate of 2 per cent. per mensem from the date of the decree. Seven instalments were duly paid and then there was default. The decree-holder applied in execution to recover the balance, Rs.3,800, with interest at the stipulated rate from the date of the decree. The judgment-debtor objected that the stipulation as to the interest was of a penal nature, and the question was whether the court executing the decree could give any relief against it.

Held, by the Full Bench, that section 74 of the Contract Act applies to the case of a compromise decree and it is open to a court executing such decree to interfere with a stipulation by way of a penalty contained in the compromise. *Raghunandan Prasad* v. *Ghulam Ala-ud-din Beg*, I. L. R., 46 All., 571, overruled.

Per MUKERJI, A. C. J.—Section 74 of the Contract Act applies in terms to a contract, but, in the case of a compromise decree, what there is before the court is a contract pure and simple. In passing a compromise decree the court does not exercise its judgment at all but merely embodies the terms of the agreement; and the decree does not cease to be a contract, for essentially it is a matter of contract and nothing else. Section 74 does not say that the relief to be granted under it is confined to a suit. Therefore, in executing the compromise decree, there is nothing in section 74 which prevents the court from applying that section to the case before it.

* First Appeal No. 412 of 1931, from a decree of C. I. David, Subordinate Judge of Allahabad, dated the 21st of July, 1931.

In entertaining a plea that one of the terms of the compromise contains a penal clause the court executing the decree does not really go behind the decree, but it finds out, as it is entitled to find out, on payment of what amount the decree should be discharged. If, instead of the amount of penal interest stipulated for, the court came to the conclusion that only a reasonable amount was to be paid, the court would be deciding a question as to the satisfaction or discharge of the decree under section 47 of the Civil Procedure Code, and would not be going against the terms of the decree.

An agreement which contains a penal clause is not necessarily an unlawful compromise, and in the stipulation contained in the compromise in the present case there was nothing which made the compromise not "lawful" for the purpose of order XXIII, rule 3 of the Civil Procedure Code.

Per NIAMAT-ULLAH, J.—Section 74 of the Contract Act, viewed in its proper perspective, does not involve any interference with the decree when applied to a compromise on which a decree is passed. Parties to every contract containing a stipulation by way of penalty have rights and are subject to obligations mentioned in section 74, which are part and parcel of every such contract which should be deemed to include a proviso, imported by section 74, to the effect that the party complaining of the breach is entitled only to reasonable compensation not exceeding the penalty. Where such a contract is embodied in a compromise decree, the decree should be deemed to be giving effect to the compromise, with the legal incidents arising from section 74 regarding enforcement of the penal clause. The question of reasonable compensation will, therefore, arise when the compromise decree is sought to be enforced, and in determining such question the court executing the decree will not be going behind the decree, though seemingly it might appear to be doing so, but in reality will be giving effect to the decree in accordance with its real legal import.

This case was first heard by a Division Bench, which referred certain questions of law for decision by a Full Bench, with the following referring order :

NIAMAT-ULLAH and KISCH, JJ. :—An important question of law has been raised in this appeal, which arises out of execution proceedings. The appellant executed a deed of mortgage for Rs.7,000, carrying interest at the rate of 1 per cent. per mensem, compoundable every six months, in favour of the

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respondent. The latter instituted a suit on foot of her mortgage for recovery of Rs.22,170. The suit was resisted on grounds which it is not necessary to mention for the purpose of this appeal. The parties entered into a compromise, which provided that a decree be passed for Rs.11,500, payable by yearly instalments of Rs.1,100 which would fall due on the 30th of June of each succeeding year, the first instalment being payable on the 30th of June, 1920. It also provided that in case of default in payment of any one instalment the entire decretal amount remaining unpaid would become immediately payable, and the decree-holder would be entitled to interest at the rate of 2 per cent. per mensem from the date of the decree. The mortgaged property was liable to be sold for satisfaction of the amount remaining unpaid. A decree was passed on foot of the aforesaid compromise on the 30th of July, 1919. The appellant paid seven instalments at due dates. Default was made in paying the eighth instalment. Thereupon the decree-holder applied for execution of decree for recovery of the remaining sum, Rs.3,800, with interest at the rate of 2 per cent. per mensem from the date of the decree. The appellant objected to the stipulation relating to the interest contained in the compromise, on the ground that it was in the nature of penalty and should not be enforced.

On the one hand, it is argued by the learned counsel for the appellant that a decree passed on compromise has no greater sanctity than the compromise itself so far as the application of section 74 of the Indian Contract Act is concerned. On the other hand, the learned counsel for the respondent contends that it is a well settled rule of law that a court executing a decree cannot go behind the terms of the decree. There is authority in support of both these views. A Division Bench of this Court has held in *Raghunandan Prasad* v. *Ghulam Ala-ud-din Beg* (1), that section 74 of the Indian Contract Act does not apply to a decree passed on compromise so as to relieve the judgment-debtor against a penal stipulation as regards interest contained in the compromise. Another Division Bench of this Court has doubted the correctness of this view in *Kishen Prasad* v. *Kunj Behari Lal* (2). It must, however, be said that the actual decision of the learned Judges proceeds on a different ground, and it was not necessary for them to express any opinion on the question which had been decided in *Raghunandan Prasad's* case. The learned Judges themselves observe that the point was not necessary for the purposes of the case

(1) (1924) I.L.R. 46 All., 571. (2) (1925) 24 A.L.J., 210.

before them, and that they did not express a definite opinion on that question. They have, however, marshalled all the authorities bearing on the subject and seem to be strongly of opinion that the view taken in *Raghunandan Prasad's* case is not correct. They have referred to a number of decisions of other High Courts. One of the learned Judges referred to a Privy Council decision in *Ram Gopal Mookerjea* v. *Samuel Masseyk* (1) and considered that the principle underlying the decision in *Balkishen Das* v. *Run Bahadur Singh* (2) supports the view which he was inclined to take. He was also inclined to the view that wholly apart from section 74 and on equitable grounds a penal clause occurring in a compromise which has become merged in a decree can be relieved against. The learned counsel for the appellant has referred us to a case decided by a learned single Judge of the Lahore High Court, *Chhunna Mal* v. *Hanuman Bakhsh* (3). Were it not for the case of *Raghunandan Prasad* v. *Ghulam Ala-ud-din Beg* (4), we would have held on the authorities that section 74 of the Indian Contract Act applies to a compromise which has become merged in a decree. We, however, feel that one Division Bench of this Court should not depart from the view taken by another Division Bench where the question is one of importance, on which different views can be entertained. We think that this should be referred to a larger Bench. We are clearly of opinion that this is eminently a question which ought to be settled once and for all so far as this Court is concerned. Accordingly, we direct that the case be laid before the Hon'ble the Chief Justice with the request that he may be pleased to constitute a larger Bench for decision of the following questions of law:

(1) Does section 74 of the Indian Contract Act apply to a compromise decree, and whether it is open to a court executing such decree to go behind it so as to interfere with a stipulation by way of penalty contained in the compromise?

(2) If section 74 of the Indian Contract Act does not apply, can the principle underlying that section be extended to a decree passed on a compromise containing a stipulation by way of penalty?

The case shall be laid before us on the reference being answered by the Full Bench.

(1) (1860) 8 Moo. I.A., 239.
(2) (1883) I.L.R., 10 Cal., 305.
(3) A.I.R., 1927 Lah., 659.
(4) (1924) I.L.R., 46 All., 571.

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Before the Full Bench,—

Messrs. *Hyder Mehdi* and *Zafar Mehdi*, for the appellant.

Dr. *K. N. Katju*, Messrs. *B. Malik* and *L. Zutshi* and Miss *S. K. Nehru*, for the respondent.

MUKERJI, A. C. J.:—Two questions have been referred to the Full Bench and they have been formulated as follows:

(1) Does section 74 of the Indian Contract Act apply to a compromise decree, and whether it is open to a court executing such decree to go behind it so as to interfere with a stipulation by way of penalty contained in the compromise?

(2) If section 74 of the Indian Contract Act does not apply, can the principle underlying that section be extended to a decree passed on a compromise containing a stipulation by way of penalty?

The facts of the case as stated in the order of reference are as follows. There was a suit on a mortgage bond for Rs.7,000 carrying interest at 1 per cent. per mensem, compoundable every six months. In a suit instituted on the bond a sum of Rs.22,170 was claimed. The defendant contested the suit but ultimately the parties entered into a compromise by which a decree was made for Rs.11,500 payable by yearly instalments of Rs.1,100. These instalments were to be paid on the 30th of June of each succeeding year commencing with the 30th of June, 1920. It was provided that in case of default in payment of any one instalment the entire decretal amount remaining unpaid would become immediately payable, and the decree-holder would be entitled to interest at the rate of 2 per cent. per mensem from the date of the decree. A decree followed in terms of the compromise. The judgment-debtor paid certain instalments and a sum

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of Rs.3,800 remained unpaid. This the decree-holder sought to recover with interest at 2 per cent. per mensem from the date of the decree, as stipulated in the compromise. The judgment-debtor objected to the execution on the ground that the stipulation as to the interest was in the nature of a penalty and it could not be enforced against him.

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The first point that we have to decide is whether section 74 applies to the circumstances like the present. Section 74 in terms applies to the case of a contract and begins by saying, "When a contract has been broken". Two views have been urged before us. One view is that a decree based on a compromise, in spite of the fact that it is a decree, is in substance a contract and therefore section 74 should be applied to a consent decree. The other view that has been urged before us is that, whether it is based on a contract or not, a decree is a decree after all and no court executing a decree can go behind it. There seems to be an apparent conflict between these two views and we have to find out which view we have to accept.

If we consider the nature of a compromise decree we shall be able to arrive at a satisfactory conclusion. Order XXIII, rule 3 deals with a compromise decree. It says: "Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, ... the court shall order such agreement, compromise . . . to be recorded, and *shall* pass a decree in accordance therewith so far as it relates to the suit." It will be noticed that the court has to do two things when a compromise is produced before it. It has to find out whether the compromise or agreement is a lawful one, and the second is to pass a decree in accordance with the agreement or compromise. Beyond finding out whether the agreement or compromise is lawful or not, the court is left with no choice in the matter. An

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agreement which contains a penal clause is not necessarily an unlawful compromise and in the case of the stipulation contained in the compromise already quoted there was nothing unlawful. A party may very well agree that in case of default of payment on a due date he would pay a certain rate of interest, not only from the date of default but from a date prior to that, namely from the date of the decree. As we have said, there is nothing unlawful in this agreement. Thus, an agreement like this must be recorded by the court and a decree must be passed in terms of the compromise or agreement.

By section 96 of the Civil Procedure Code an appeal is allowed against a decree, but none is allowed against a decree passed on compromise. Sub-section (3) says: "No appeal shall lie from a decree passed by the court with the consent of parties." Thus, not only a court of original jurisdiction but also the appellate court is debarred from looking into the terms of the compromise which is lawful but contains a penal clause.

The result of the compromise decree is that the court is precluded from coming to any conclusion of its own and it has to accept a lawful compromise arrived at by the parties. This is the function of the court before which a compromise is produced.

In executing such a decree the court gives effect to the terms arrived at by the parties, although these terms have not been formulated by the court itself. If a question should arise as to the satisfaction or discharge of such a decree, the matter can be considered only by the court executing the decree and not in a separate suit (*vide* section 47 of the Code of Civil Procedure).

The question now is, whether the court executing the decree, in deciding whether the decree has been satisfied or not, can say that the payment of a certain

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amount of money which does not contain any penal interest or which contains only a part of the penal interest, is sufficiently good for the discharge of the decree. If, for example, in the case before us, the court may choose to say that instead of 2 per cent. interest, 1 per cent. interest would be a reasonable amount to be paid in the circumstances of the case, it may call upon the judgment-debtor to pay that amount of the interest and no more. If the court chooses to act like that, and on receipt of the amount thus found due it declares that the decree has been satisfied, it does so declare as a court executing the decree and does not, in making the declaration, in any way go against the terms of the decree.

Section 74 applies in terms to a contract, but, in the case of a compromise decree, what is there before the court but a contract pure and simple? I have already stated that the court has not exercised its mind at all in selecting how the case should terminate. In making the decree the court has not exercised its judgment at all. If that is so, I fail to see how the decree ceases to be a contract when, essentially, it is a matter of contract and *nothing else*. Section 74 of the Contract Act does not say that the relief to be granted under it is confined to a suit. Therefore, in executing the compromise decree, there is nothing in section 74 which prevents a court from applying that section to the case before it. Thus, on general principles, and on the language of the law, I am clearly of opinion that the answer to the question No. 1 should be given in the affirmative.

Coming to authorities, I shall first consider the cases decided in this Court. There are two cases which are directly applicable and the earlier is *Raghunandan Prasad* v. *Ghulam Ala-ud-din Beg* (1). The judgment on the point is rather short. The fact was that on the compromise decree an agreement had been made to

(1) (1924) I.L.R., 46 All., 571.

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pay interest at 3 per cent. per mensem in case of default of payment on a particular date. Two learned Judges of this Court held that the interest, however hard the terms, must be paid, because the court could not go behind the terms of the decree. Their Lordships professed to follow a case of the Calcutta High Court, namely *Kalipada Sarkar* v. *Hari Mohan Dalal* (1). But the facts of that case were entirely different. In that case the plea had been taken that one of the parties was not properly represented in the suit and therefore the decree could not be executed against him. That was a matter which could not be taken cognizance of by the court under section 47 of the Code of Civil Procedure. The question could be raised only by a separate suit. The Calcutta case therefore was no authority for the view expressed by the two learned Judges of this Court in *Raghunandan's* case (2). The other case in this Court is *Kishen Prasad* v. *Kunj Behari Lal* (3). It must be admitted at the outset that the opinion expressed there was an *obiter dictum*, because the actual decision of the case was not based upon the opinion expressed. Nonetheless, two Judges of this Court (including myself) came to the conclusion that section 74 of the Indian Contract Act applied to a compromise decree. I pointed out in my judgment in that case that the court embodying the terms of a decree had no discretion to use and was bound to record the contract as it stood, if that contract happened to be lawful. The question of section 47 was not raised in that case and was not considered. But I have already expressed the opinion that the plea of penalty can be properly raised within the purview of section 47 of the Code of Civil Procedure.

Coming to other courts, the Lahore High Court in two cases has accepted the view that the terms of a

(1) (1916) I.L.R., 44 Cal., 627. (2) (1924) I.L.R., 46 All., 571.
(3) (1925) 24 A.L.J., 210.

compromise decree can be interfered with in execution. The earlier case is *Chhunna Mal* v. *Hanuman Bakhsh* (1) and the later case is *Jwala Ram* v. *Mathra Das* (2). In Bombay the opinion was at one time entertained that a compromise decree, being a decree, no plea could be taken that it contained a penal clause which should be relieved against. This view was taken in *Shirekuli Timapa* v. *Mahablya* (3). But in *Krishna Bai* v. *Hari Govind* (4) a Full Bench of that court dissented from this view. It is true that the case before the Full Bench did not arise out of an execution proceeding but arose out of a regular suit, but the principle applied. If the terms of the compromise were sacrosanct, they could not be interfered with even in a subsequent suit. Their Lordships of the Bombay High Court in the Full Bench case doubted the correctness of the principle on which the case in *Shirekuli Timapa* v. *Mahablya* had been decided.

In Madras the view has been uniformly taken that in execution of a decree the executing court could see whether the compromise contained any penal clause or not. The latest case on the point is *S. R. Jaya Rao* v. *Venkatanarayana Chetty* (5).

In Calcutta the same view has been taken, not only in suits but also in execution proceedings. *Surendra Nath Banerjee* v. *Secretary of State for India in Council* (6) was the case of an execution of a decree and *Ganesh Chandra Pal* v. *Chandra Mohan Datta* (7) was the case of a suit.

The Patna High Court, in *Jitendra Nath Chatterjee* v. *Mt. Jasoda Sahun* (8) has agreed with the Bombay case, *Shirekuli Timapa* v. *Mahablya*, already referred

(1) A.I.R., 1927 Lah., 659.
(2) A.I.R., 1931 Lah., 696.
(3) (1886) I.L.R., 10 Bom., 435.
(4) (1906) I.L.R., 31 Bom., 15.
(5) (1924) 80 Indian Cases, 925.
(6) (1919) 24 C.W.N., 545.
(7) (1923) 28 C.W.N., 984.
(8) A.I.R., 1926 Pat., 122.

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to and holds that in a court executing the decree the plea that there was a penal clause in the agreement could not be entertained.

Mukerji, A. C. J.

On principle considered and on the majority of decided cases I am clearly of opinion that section 74 does apply to the case of the compromise decree. In entertaining a plea that one of the terms of the compromise contains a penal clause the court executing the decree does not really go behind the decree, but it finds out, as it is entitled to find out, on payment of what amount the decree should be discharged. I would answer the question No. 1 accordingly.

In view of my opinion entertained on question No. 1, question No. 2 does not arise. I would answer the reference accordingly.

KING, J. :—I agree that the first question should be answered in the affirmative.

NIAMAT-ULLAH, J. :—I agree generally with the views expressed by the Hon'ble ACTING CHIEF JUSTICE, but I would like to add a few observations of my own on the principal question which calls for decision in this reference. It seems to have been assumed by the learned Judges who decided the case of *Raghunandan Prasad* v. *Ghulam Ala-ud-din Beg* (1) that if the court executing the decree applies section 74 of the Indian Contract Act to a compromise which has become merged in a decree, it must necessarily interfere with the decree itself. The argument of the learned counsel for the respondent proceeded on the same assumption. In my opinion section 74 of the Indian Contract Act, viewed in its proper perspective, does not involve any interference with the decree when applied to a compromise on which a decree is passed.

Section 74 enacts the rule that "if a contract contains any stipulation by way of penalty, the party complaining of the breach is entitled to receive from the party

(1) (1924) I.L.R., 46 All., 571.

who has broken the contract a reasonable compensation not exceeding the penalty stipulated for." Parties to every contract containing a stipulation by way of penalty have rights and are subject to obligations mentioned in section 74, which are part and parcel of every such contract which should be deemed to include a proviso, imported by section 74, to the effect that the party complaining of the breach is entitled to reasonable compensation not exceeding the penalty but is not entitled to enforce the penalty stipulated for in the contract. Where such a contract is embodied in a compromise which is recorded under order XXIII, rule 3 of the Code of Civil Procedure the decree should be deemed to be giving effect to the compromise with the legal incident arising from section 74, namely that the party complaining of the breach is not entitled to enforce the penal clause but is entitled only to reasonable compensation not exceeding the penalty stipulated for. What is reasonable compensation is to be determined whenever a dispute arises and the contract is sought to be enforced. The court executing the compromise decree can only enforce covenants either expressly mentioned in the compromise or therein implied from the legal incident attaching to the compromise on which the decree is based. In determining the compensation to which the party complaining of the breach of the contract is entitled the court executing the decree is not going behind the decree. Its action may seemingly appear to amount to interference with the apparent tenor of the decree. In reality, however, far from interfering with the decree the court is giving effect to it in accordance with its real legal import. In this view, I do not think it necessary to hold that the well established rule, that a court executing the decree cannot go behind it, admits of exceptions or that an exception would be grafted on that rule if section 74 of the Indian Contract Act be applied to a compromise

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which has become merged in the decree. Nor do I think, for the reasons already stated, that there is any conflict between the aforesaid rule and the view that, acting under section 74 of the Indian Contract Act, a court executing a decree can relieve against the penal provision contained in the compromise.

Niamat-ullah, J.

For these reasons I agree with the Hon'ble ACTING CHIEF JUSTICE in answering the first question referred to this Bench in the affirmative. I also agree that the second question does not arise.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, Mr. Justice King and Mr. Justice Niamat-ullah

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KHAIR-UN-NISSA BIBI (JUDGMENT-DEBTOR) *v.* OUDH COMMERCIAL BANK (DECREE-HOLDER)*

Civil Procedure Code, order XXXIX, rule 1—Temporary injunction—Stay of execution of a decree by temporary injunction granted in another suit—Injunction granted on furnishing security hypothecating immovable property—Mode of enforcing security—Separate suit or execution—Civil Procedure Code, section 47.

A final decree for sale on a mortgage was put in execution, and one *K* was impleaded as an heir to one of the judgment-debtors deceased. *K*, however, had a claim to certain items of the mortgaged property in her own right and she instituted a suit, against the decree-holder and others, for a declaration that the decree was not binding on her or on the items of property belonging to her. The suit was dismissed and *K* filed an appeal in the High Court. She applied in the High Court for an injunction, pending disposal of the appeal, restraining the decree-holder from executing his decree against her. The decree-holder objected that as part of the decretal amount did not carry any interest, he would suffer loss of interest if the sale were to be stayed. It was estimated that probably Rs.6,000 would be the amount of such interest up to the time when the appeal would come to be decided, and it was ordered that if *K* executed a security bond for Rs.6,000 to cover the loss of interest her application would be granted. *K* accordingly furnished the security bond, hypothecating im-

* First Appeal No. 431 of 1931, from a decree of C. Deb Banerji, Subordinate Judge of Azamgarh, dated the 20th of June, 1931.

movable property, and execution of the decree was stayed by temporary injunction. *K's* appeal was eventually dismissed and the decree-holder then sought, in execution of the decree in *K's* suit, to realise the Rs.6,000 by sale of the property hypothecated in the security bond. The question arose whether the property could be brought to sale in this way or only upon a suit for sale thereof.

Held, that the remedy of the decree-holder was by a suit on the security bond and not by execution of a decree or order.

There was no decree or order which directed *K* to pay Rs.6,000 or any sum of money to him. The only decree in *K's* suit was one dismissing her suit and awarding costs to the opposite party. The order regarding the furnishing of security was not an executable order, but was of the nature of a declaratory order. As there was no decree or order capable of execution regarding the Rs.6,000, section 47 of the Civil Procedure Code had no application, and the remedy was by the institution of a suit for sale of the property hypothecated in the security bond.

The Bench which first heard this appeal referred it to a Full Bench, with the following referring order :—

NIAMAT-ULLAH and BENNET, JJ. :—This is an execution first appeal in which the following point of law has arisen : "Is it necessary that a regular suit should be brought for the enforcement of a hypothecation lien on immovable property mortgaged as security in a suit or is it open to the court to which the security has been furnished to order sale of the property in execution proceedings without a separate suit being brought to enforce the hypothecation lien?"

It appears to us that there is a conflict of authority on this point between certain rulings of this Court. In *Amir* v. *Mahadeo Prasad* (1) it was laid down that a regular suit is necessary. It is true that in that case the equity of redemption had passed from the surety to a third person, but the ruling did not limit the principle to that particular case. On the other hand it was laid down in *Beti Mahalakshmi Bai* v. *Badan Singh* (2) that there was no need to file a separate suit and that the enforcement of a hypothecation lien could be made by the court to which the surety had been furnished. The correctness of the latter ruling has been doubted in *Sukumari Debi* v. *Mugneeram Bhanger & Co.* (3), in which it was said that this ruling was inconsistent with a

(1) (1916) I.L.R., 39 All., 225. (2) (1923) I.L.R., 45 All., 649.
(3) (1926) I.L.R., 54 Cal., 1.

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dictum of their Lordships of the Privy Council in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (1), a ruling which *Beti Mahalakshmi Bai* v. *Badan Singh* purported to follow. In view of this conflict between two rulings of this Court we direct that this appeal should be laid before the Hon'ble the Chief Justice for orders for the formation of a larger Bench to decide this appeal. There is no other point raised in this appeal except this point of law.

The appeal was then laid before and heard by a Full Bench.

Messrs. *Mukhtar Ahmad* and *S. N. Gupta*, for the appellant.

Mr. *Shabd Saran*, for the respondent.

MUKERJI, A. C. J., KING and NIAMAT-ULLAH, JJ. :—This appeal has been referred to us by a Bench of two learned Judges of this Court because the point involved is of importance and it was thought necessary that the law on the point should be laid down by a Full Bench.

The facts of the case will have to be stated at some length in order to appreciate the point or points of law that arise. The Oudh Commercial Bank obtained a decree for sale in suit No. 50 of 1913 of the court of the Subordinate Judge of Fyzabad against Riasat Husain and Saleha Bibi. The suit was based on a mortgage bond. The final decree in the suit was passed on the 16th of December, 1915. Execution was taken out and Khair-un-nissa Bibi, who is the appellant before us, was impleaded as an heir to one of the deceased judgment-debtors. She, however, it appears, claimed some of the property mortgaged in her own right and therefore she instituted a suit, being suit No. 383 of 1923, in the court of the Subordinate Judge at Azamgarh to obtain a declaration that she was not bound by the decree No. 50 of 1913 obtained in the court of the Subordinate Judge of Fyzabad by the Oudh Commercial Bank. Her suit was dismissed on the 18th of April, 1925, and she filed a first appeal, being appeal No. 313 of 1925, in this Court. The Oudh Commercial

(1) (1919) I.L.R., 42 All., 158.

Bank having taken out execution of the decree No. 50 of 1913 obtained by it, Khair-un-nissa Bibi applied to this Court for an order of injunction restraining the Oudh Commercial Bank from executing its decree. In the course of the consideration of the application it transpired that a part of the decree obtained by the Oudh Commercial Bank did not carry any interest and it was pointed out to the Court, on behalf of the Bank, that if the execution of the decree was stayed the Bank would suffer loss of interest. The amount which did not carry interest was about Rs.27,000 and the learned Judges of this Court calculated that in the course of the average period of the pendency of a first appeal the Oudh Bank would lose a sum of Rs.6,000 in interest, the sum being calculated at 6 per cent. per annum. The plaintiff was told that her application for stay of execution would be granted if she executed a security bond in a sum not less than Rs.6,000 to secure the loss of interest. Such a security bond was furnished on the 14th of May, 1926, and the execution of the decree No. 50 of 1913 was stayed by issue of a temporary injunction.

Khair-un-nissa Bibi's appeal (383 of 1923) was eventually dismissed by this Court. The Bank brought the property, as to which it had obtained an order for sale, to sale and realized a large amount of money. Thereafter it proceeded to execute the decree of appeal No. 383 of 1923 with respect to Rs.6,000 by sale of the property which Khair-un-nissa Bibi had hypothecated under the security bond of the 14th of May, 1926. An objection was taken by Khair-un-nissa Bibi that it was not open to the Bank to bring the property to sale without a suit. The objection was dismissed and she has filed the appeal now before us.

The question to be determined is whether for the realization of the security given on the 14th of May, 1926, by Khair-un-nissa Bibi the Oudh Commercial Bank should have recourse to a suit or whether it can

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execute any decree or order, and if so, what decree or order.

Before the learned Judges hearing the appeal as a Division Bench several rulings were cited and we have to consider the bearing of those rulings on the question before us. The rulings that were cited before the learned Judges related mostly to securities furnished by third parties as sureties, under the Civil Procedure Code of 1908.

To start with, we have got the case of *Mukta Prasad* v. *Mahadeo Prasad* (1). In this case the person who offered security was one Mahadeo Prasad. He not only made himself personally liable but also hypothecated some property. The learned Judges of this Court (PIGGOTT and WALSH, JJ.) treated the case as if there was no hypothecation of property by way of security, but only a personal liability. Their Lordships held that, in the circumstances, there was no bar to the decree being executed personally against Mahadeo Prasad nor was there any bar to the property of Mahadeo Prasad (which had been mentioned in the bond) being attached and sold. This case therefore is no guide to us.

The next case is that of *Amir* v. *Mahadeo Prasad* (2), decided by RICHARDS, C. J., and BANERJI, J. This was a case in which a third party stood surety and mortgaged his property. Their Lordships definitely held that the earlier case, *Mukta Prasad* v. *Mahadeo Prasad* (1), was decided according to its peculiar circumstances, and in the case before their Lordships Jagannath's property could be sold only by means of a suit and not in execution of the decree. *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (3) is a decision of their Lordships of the Privy Council. In this case the surety agreed that the mesne profits to be decreed in favour of the

(1) (1916) I.L.R., 38 All., 327. (2) (1916) I. L.R., 39 All., 225.

(3) (1919) I.L.R., 42 All., 158.

opposite party might be realized from his property. The security bond was given in favour of the court and not in favour of any individual. Their Lordships said that section 145 of the Civil Procedure Code did not apply. Their Lordships pointed out that there was no mortgage because there was no mortgagee. In the circumstances their Lordships held that the only way to enforce the security was by execution. Their Lordships pointed out that in the case of securities given in accordance with the forms to be found in Appendix G, Nos. 2 and 3 of the Civil Procedure Code, 1908, no difficulty like the one that arose in the case before their Lordships could arise, because in documents executed according to the forms some individual would be mentioned as the mortgagee.

The next case that we have been asked to consider is the case of *Beti Mahalakshmi Bai* v. *Badan Singh*, (1). Two learned Judges of this Court (WALSH and KANHAIYA LAL, JJ.) purported to follow the case of *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*. The main reason that guided their Lordships was that the bond before them, like the bond in *Raj Raghubar Singh's* case, had no mortgagee mentioned therein. At page 652 there occur the following words: "The security bond does not purport to have been executed in favour of the decree-holder. It contains an undertaking given to an appellate court which granted the stay of execution subject to the production of such security . . ." There is no doubt a remark at page 651 of the report as follows: "In the clause, 'to the extent to which he has rendered himself liable,' the word 'personally' was added by the present Code of Civil Procedure, but by the addition of that word it could hardly have been intended to limit the enforcement of the security to a personal liability, for forms 2, 3 and 4 of Appendix G appended to the Code of Civil Procedure provide for the hypothecation of property

(1) (1923) I.L.R.. 45 All., 649.

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to secure the performance of the obligation undertaken by the surety." If by this remark their Lordships meant to say that where a surety gave a mortgage, section 145 of the Civil Procedure Code would be a sufficient warrant for selling the mortgaged property in execution, we would respectfully dissent from that view. We are fortified in our opinion by what fell from their Lordships of the Privy Council in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (1) and by the plain language of section 145 itself.

In *Ram Kishun* v. *Lalta Singh* (2) it was laid down that if the security furnished had to be realized from the property given as security, the realization must be by a suit and not in the execution department. The actual words used are: "It is also clear that if he executed a valid hypothecation bond as security, the charge could be enforced by a separate suit." To this decision one of us was a party.

In the case before us the security was furnished not by a third party but by a party to the litigation. The question is whether, in the circumstances stated, the remedy of the Bank is by a suit or by execution of a decree or order.

There is no decree or order which directs Khair-un-nissa Bibi to pay a sum of Rs.6,000 or any sum of money to the Oudh Commercial Bank, except such amount as was decreed against her for costs of the two courts. The order as to security need not be quoted at length, but the following quotations will show the nature of it: "The third objection is that a portion of the decree bears no interest and if the sale is stayed and the Bank prevented from realizing the decretal money, considerable loss will accrue to the Bank." The quotation shows the argument of the Bank against the passing of an order staying execution of the decree No. 50 of 1913. The following extract from the same

(1) (1919) I.L.R., 42 All., 158. (2) (1928) I.L.R., 51 All., 346.

judgment will show the reason that led the Hon'ble Judges to make an order as to security: "As regards the interest which the Bank claims to be entitled to as compensation for the delay in executing the decree it seems desirable that the Bank should be allowed interest at 6 per cent. on the portion of the decretal money which bears no interest, as compensation for the delay which would accrue if the sale be stayed. The amount of such interest for a period of three years will approximately amount to Rs.6,000." This, then, was the reason why the appellant was called upon to furnish security in the amount of Rs.6,000. The following is the order that was made on the application: "The appellant will be required to file an additional security for Rs.6,000 for payment of interest as compensation on that portion of the decree which does not bear interest for the period for which the recovery of the decretal money *may be delayed* and the Bank will be entitled to enforce the security if the appeal is dismissed but not otherwise." We may take it that on the security being furnished on the 14th of May, 1926, the Division Bench passed an order staying the sale till the decision of the appeal No. 313 of 1925.

On the facts stated above, it seems to be clear to us that there is no order directing Khair-un-nissa Bibi to pay the amount of Rs.6,000 to the Oudh Commercial Bank that could be executed by the Bank against Khair-un-nissa Bibi. It was argued that the order quoted was itself executable as an order, but the order, in its nature, is *declaratory*. It declared that if the appellant Khair-un-nissa Bibi furnished the security the impending sale would be stayed and the Bank would be *entitled* to recover compensation, at the rate of 6 per cent. interest, on the amount of money which did not carry interest. The amount of money which the Bank could realize by way of compensation was not Rs.6,000 but depended on the period during which the execution of decree No. 50 of 1913 might be

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stayed. As a matter of fact, the appeal was decided in less than three years, that is to say, in January, 1929. It is only after the dismissal of the appeal that the liability of Khair-un-nissa Bibi could have been determined. Evidently there is no "order" which professed to determine that liability and to direct Khair-un-nissa Bibi to pay anything to the Oudh Commercial Bank by way of compensation. In the circumstances, it is difficult for us to say how the Bank could execute what it supposed to be a decree or order standing in its favour in the manner it is sought to execute it. The remedy declared by the order of the High Court, dated the 6th of April, 1926, lay, in our opinion, in the institution of a suit for sale of the property mortgaged by Khair-un-nissa Bibi.

The learned counsel for the respondent has laid great stress on the decision of their Lordships of the Privy Council in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (1). He has argued that in the case before us there is no mortgagee and therefore the security is to be realized by execution. To start with, the assumption is wrong that there is no mortgagee. The security bond distinctly states that the Oudh Commercial Bank would be entitled to realize the security. Secondly, as we have pointed out, there is no decree or order that is capable of execution. Both these facts distinguish the case before us from the case before their Lordships of the Privy Council in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*.

The learned counsel for the respondents has addressed us on the applicability of section 47 of the Code of Civil Procedure. He has argued that as the controversy has arisen between the parties to the suit therefore the dispute that has arisen must be decided in execution and not by way of a separate suit. But to this contention the clear answer is that there is no order or decree which can be executed. We have

(1) (1919) I.L.R., 42 All., 158.

already pointed out that this Court never passed any order to the effect that the Oudh Commercial Bank was to realize the sum of Rs.6,000, or anything less than that, by way of compensation from Khair-un-nissa Bibi, *by virtue of that very order*. As there is no order or decree in execution of which the question has arisen, section 47 does not apply. Section 47 reads: "All questions arising between the parties to the suit in which the decree was passed . . . and relating to execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit." As there was no decree or order in existence, none could be executed. The decree which is sought to be executed, namely the decree No. 383 of 1923, is a wholly different decree. It was the decree passed in Khair-un-nissa Bibi's suit to obtain a declaration that the decree No. 50 of 1913 was not executable against her and the property belonging to her. The decree in the appeal ended by dismissing the appeal and maintaining the order of dismissal of the suit. The only decree that could be executed was a decree for costs and it is not that decree which is being executed at the instance of the Oudh Commercial Bank. The decree No. 50 of 1913 was a decree for realization of the mortgage amount and that is not the decree under execution and the present controversy has not arisen either in execution of decree No. 50 of 1913, or in execution of decree No. 383 of 1923. In this view there is no controversy which is to be settled by the application of section 47 of the Code of Civil Procedure.

For the reasons given above we are of opinion that the respondent has misconceived his remedy and his application to realize Rs.6,000 from Khair-un-nissa Bibi in execution was not maintainable.

We allow the appeal, set aside the order of the court below and dismiss the respondent's application for execution with costs throughout.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, Mr. Justice King and Mr. Justice Niamat-ullah.

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January, 12

ABDUL WAHAB KHAN AND ANOTHER (DEFENDANTS) *v.* IBRAHIM KHAN (PLAINTIFF)*

Agra Tenancy Act (Local Act III of 1926), section 246—Appeal—Third appeal to High Court lies—"Appellate decree".

Under section 246 of the Agra Tenancy Act a third appeal can lie to the High Court from the decree of a District Judge passed in a second appeal from the decree of a Collector passed in appeal from a decree of an Assistant Collector, second class.

The expression "appellate decree" in that section would apply equally to a decree passed by the District Judge in first appeal or to a decree passed by him in second appeal. The language of this section is wide enough to authorize an appeal to the High Court from a decree passed by a District Judge in second appeal, because such a decree would be an "appellate decree". The language of section 182 of the Tenancy Act of 1901 was different and provided for "second appeals" only. *Lachmi Narain* v. *Nirotam Das*, I. L. R., 29 All., 69, now obsolete.

In this case the following question was referred to a Full Bench: "Whether a third appeal lies to the High Court against the decree of a District Judge passed in a second appeal against the appellate decree of a Collector."

Mr. *S. N. Seth*, for the appellants.

Mr. *Panna Lal*, for the respondent.

MUKERJI, A. C. J., KING and NIAMAT-ULLAH, JJ.:—This reference to a Full Bench raises a question whether a third appeal lies to the High Court against the decree of a District Judge passed in a second appeal against the appellate decree of a Collector.

The appeal arises out of a suit for arrears of irrigation dues amounting to Rs.172-5-0, which was brought against the heirs of one Sughra Begam, who was said

* Second Appeal No. 285 of 1930, from a decree of Raghunath Prasad, District Judge of Bulandshahr, dated the 7th of January, 1930, confirming a decree of K. Prasad, Collector of Bulandshahr, dated the 20th of June, 1929, who confirmed a decree of Muhammad Mustafa Khan, Honorary Assistant Collector, second class, of Bulandshahr, dated the 21st of February, 1929.

to be a tenant of the plaintiff. The suit was defended on a number of grounds, which we need not specify for the purpose of disposing of the point in issue. The suit was decreed for a sum of Rs.169-2-6 by an Assistant Collector of the second class on the 21st of February, 1929. The defendants appealed to the Collector, who dismissed the appeal on the 20th of June, 1929. The defendants appealed a second time to the District Judge, who dismissed their appeal on the 7th of January, 1930. The defendants then instituted this third appeal in the High Court against the appellate decree of the District Judge, and the question is whether the appeal is competent.

An appeal from the decree of the Assistant Collector of the second class lay to the Collector, in accordance with the terms of section 241 of the Agra Tenancy Act of 1926. An appeal from the appellate decree of the Collector lay to the District Judge, if the conditions laid down in section 243 were fulfilled. It is unnecessary for us to consider whether those conditions were, in fact, fulfilled. The District Judge entertained and decided the appeal.

Section 246 is the section which governs the question whether a third appeal lies to the High Court in the circumstances mentioned above. This section enacts that "An appeal shall lie to the High Court from the appellate decree of a District Judge on any of the grounds specified in section 100 of the Code of Civil Procedure, 1908."

It must be observed that the words used in this section are "the appellate decree" and the expression "appellate decree" would apply equally to a decree passed by the District Judge in first appeal or to a decree passed by him in second appeal. In our opinion the language of this section is certainly wide enough to authorize an appeal to the High Court from a decree passed by a District Judge in second appeal, because such a decree would undoubtedly be an "appellate decree".

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Our conclusion on this point is fortified by a reference to the language of the Agra Tenancy Act of 1901. In that Act the question of appeals to the High Court from decrees of the District Judge was governed by the terms of section 182. This section provided: "A *second* appeal shall lie to the High Court from the decree in appeal of a District Judge in accordance with the provisions of chapter XLII of the Code of Civil Procedure."

The important point to observe is that this section uses the expression "*second* appeal". For that very reason it has been held in *Lachmi Narain* v. *Nirotam Das* (1) that no third appeal will lie to the High Court from a decree of the District Judge passed in appeal from an appellate decree of the Collector under the provisions of the Agra Tenancy Act of 1901. The reason for the decision was that when the legislature had clearly laid down that a *second* appeal should lie to the High Court from the appellate decree of the District Judge, it was clearly intended that no *third* appeal should lie.

The omission of the word "second" from section 246 of the Tenancy Act of 1926 is, in our opinion, very significant. It seems to suggest that the legislature deliberately intended to allow third appeals to the High Court in certain cases, that is to say, they intended that there should be a third appeal to the High Court from an appellate decree passed by a District Judge under section 243. Whether that was the intention of the legislature or not, we think it is clear that the words "appellate decree" in section 246 cannot be construed to mean a decree passed in first appeal only. The words are undoubtedly applicable also to a decree passed in second appeal.

We, therefore, answer the question referred to us in the affirmative.

(1) (1906) I.L.R., 29 All., 69.

FULL BENCH

Before Sir Lal Gopal Mukerji, Acting Chief Justice, Mr. Justice King and Mr. Justice Niamat-ullah.

JAGANNATH KUNWAR AND OTHERS (DEFENDANTS) *v.* JAIPAL (PLAINTIFF)* 1933 *January*, 13

Redemption—Usufructuary mortgage—Subsequent loans—Further charge—Stipulation that subsequent loan must be paid before redemption of mortgage—Redemption by purchaser from some of the mortgagors—Integrity of mortgage being broken.

Certain zamindari property, owned by the descendants of seven brothers, was usufructuarily mortgaged by them in 1883 to *H* for Rs.600. In 1884 the descendants of one of the brothers borrowed Rs.99 from *H* on an unregistered bond, containing the stipulations (1) that the amount of the bond with interest would be paid first, when redeeming the mortgage of 1883, and then the amount due under that mortgage; and (2) that until the principal and interest of the bond were paid, the executants thereof would not mortgage or sell the aforesaid zamindari property. Three other similar bonds were executed in 1884 and 1885, for sums of money borrowed from *H*, by the descendants, respectively, of three other brothers. After the first three bonds were executed, the integrity of the mortgage of 1883 was broken, by reason of the mortgagee having purchased a share of the mortgaged property. Subsequently a suit for the redemption of the mortgage of 1883 was brought by the plaintiff, who had purchased the shares of the descendants of four of the brothers, and the question was whether they must also pay the amounts under the four bonds, and if so, to what extent.

Held that the four bonds created further charges on the property mortgaged in 1883. The stipulation in each subsequent bond that the executants should pay the amount due on that bond before they redeemed the original prior mortgage was an agreement to create a charge on the property previously mortgaged: *Aditya Prasad* v. *Ram Ratan Lal* (1)

*Second Appeal No. 767 of 1930, from a decree of Rup Kishan Aga, Additional Subordinate Judge of Allahabad, dated the 7th of February, 1930, modifying a decree of Ambika Prasad Srivastava, Additional Munsif of Allahabad, dated the 16th of March, 1929.

(1) (1930) I. L. R., 5 Luck., 365.

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followed. In addition, there was the further stipulation on the part of the executants that they would not mortgage or sell the property previously mortgaged till the money due on the subsequently executed bond had been paid; and this meant that the previously mortgaged property was made security for the payment of the money subsequently borrowed.

The integrity of the mortgage having been broken, the representatives in interest of each one of the seven brothers were entitled to redeem only their particular share of the mortgaged property on payment of one-seventh of Rs.600, together with the amount due on the subsequent bond, if any, executed by those representatives; and the plaintiff's rights and obligations were to be calculated on this basis.

This case was first heard by a Division Bench, which referred it to a Full Bench with the following referring order.

IQBAL AHMAD and KISCH, JJ.:—This is a defendant's appeal arising out of a suit for redemption of a mortgage. One Gobind Singh owned a 2 anna 8 pie share in certain villages. On his death each of his eight sons succeeded to a 4 pie share in the said property. On the 11th of April, 1883, the descendants of seven of the eight sons of Gobind Singh mortgaged their shares amounting to 2 annas 4 pies with possession to one Harmangal Singh for Rs.600. The mortgage was for a period of 15 years. The names of the seven sons of Gobind Singh whose descendants executed this mortgage were Ajit Singh, Ramghulam Singh, Dindayal Singh, Ramroshan Singh, Harnam Singh, Ahbaran Singh and Kalu Singh.

On the 16th of July, 1884, Mata Prasad Singh, grandson of Ajit Singh, borrowed a further sum of Rs.99 from Harmangal Singh, repayable on the 27th of June, 1885, with interest at 2 per cent. per mensem.

On the 6th of September, 1884, Deonarain Singh and another Mata Prasad Singh, grandsons of Harnam Singh and Ramghulam Singh, respectively, borrowed a further sum of Rs.85 from Harmangal Singh, repayable on the 27th of June, 1885, with interest at Rs.2 per cent. per mensem.

On the 11th of April, 1885, Bishnath Singh and Jageshar Singh, sons of Ramroshan Singh, borrowed a further sum of Rs.85 from Harmangal Singh, repayable on the 15th of May, 1886, with interest at Rs.2 per cent. per mensem.

On the 4th of September, 1885, Sheokumar Singh, son of Kalu Singh, borrowed a further sum of Rs.50 from Harmangal Singh, repayable on the 16th of June, 1886, with interest at Rs.2 per cent. per mensem.

The documents under which the first and the third of the above sums were borrowed contained the following recital: "If perchance we do not pay the debt on the stipulated date, the rate of interest will continue to be the same. As our share of zamindari of taluqa Bibipur is mortgaged to the abovenamed creditor, together with other co-sharers, for Rs.600, when we redeem this property we will pay this sum of Rs.99 with interest and then we will pay the mortgage money of the zamindari, and then the property will be redeemed."

The documents under which the second and the fourth sums were borrowed contained the recital: "In consideration thereof our own share of zamindari property of villages Bibipur and Maharajpur and Deobra Chak Manohra, Bansipatti, Chak Jiwan, pargana Kiwai, district Allahabad, amounting to 4 pies which is mortgaged for Rs.600, together with shares of other co-sharers; when we redeem that property we will at first pay this money, principal with interest at Rs.2 per cent. per mensem and then redeem that property . . . The date fixed for the payment of this money is . . . The interest before and after the date of stipulation will continue to run at Rs.2 per cent. per mensem."

Between the dates of the third and fourth of these deeds the integrity of the mortgage of 1883 had been broken by reason of the purchase by the mortgagee himself of the equity of redemption in respect of a 2 pie share of the mortgaged property at a court sale which was confirmed in June, 1885.

Harmangal Singh died 30 years before the institution of the suit and defendants Nos. 1 to 5 are his representatives in interest.

The plaintiff had purchased the equity of redemption of the shares of Ajit Singh, Dindayal Singh, Ramghulam Singh and Harnam Singh at a court sale on the 21st of November, 1927, and he brought the suit out of which this appeal arises to redeem the whole of the mortgage, excluding the 2 pie share purchased by the mortgagee.

The representatives in interest of the mortgagee contended that the plaintiff was not entitled to redeem the mortgage of 1883 without paying the principal and interest due under the four deeds mentioned above as well as the amount of the mortgage of 1883.

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In the trial court it was conceded by the learned counsel for the plaintiff that in view of the fact that the integrity of the mortgage had been broken the plaintiff was not entitled to redeem more than the shares that he had purchased. The correctness of this proposition was not questioned in the lower appellate court, nor has this point been agitated before us.

The trial court gave the plaintiff a decree for redemption of the shares purchased by him on payment of a proportionate share of the mortgage of 1883 and the amounts due under the second and the fourth deeds mentioned above. The learned Munsif held that while the second and the fourth deeds created a charge on the mortgaged property, the first and the third deeds did not create a charge on the property mortgaged in 1883.

On appeal by the plaintiff and cross-objection by the contesting defendants the learned Additional Subordinate Judge of Allahabad affirmed the decision of the trial court that the first and third deeds did not create a charge over the property mortgaged in 1883. He held that no doubt the intention of the persons executing these documents was to secure the money advanced by the hypothecation of the property and by tacking on these two mortgages to the mortgage of 1883, but that the language of the documents fell short of giving effect to this intention. He further held that the plaintiff could not be called upon to pay the amount due on the second of the above deeds, because at the date on which this deed was executed the integrity of the mortgage had not been broken. He, however, held that the plaintiff was bound to pay a rateable share of the money due under the fourth deed, as this deed had been executed after the integrity of the mortgage had been broken. He modified the decree of the trial court accordingly.

The contesting defendants have come to this Court in second appeal on the ground that all four documents constituted a valid charge on the mortgaged property, and the plaintiff was not entitled to redeem his share of the mortgage of 1883 without paying the amounts due under the first three deeds mentioned above, besides the amount due on the fourth deed.

The arguments addressed to us at the hearing of the appeal raised two important questions of law. The first point to be decided is whether the first and third deeds referred to above constituted a charge on the property mortgaged in 1883. According to the decision of a Full Bench of this Court in

Lallu Singh v. *Ram Nandan* (1) they would not create a charge on the property mortgaged. The position, however, has been altered by a subsequent decision of their Lordships of the Privy Council in *Aditya Prasad* v. *Ram Ratan Lal* (2). In the light of this decision it appears to us that it may be necessary to modify the view hitherto held by this Court as to what constitutes a tacking deed creating a charge on property previously mortgaged. It will be necessary in the present case to decide whether the first and third deeds created a charge upon the property or not.

In the event of it being held that these two deeds created a charge on the mortgaged property, and, in any case, in respect of the second of the deeds, a further point arises for consideration. What is the effect of these deeds which, while executed by one or two of the original mortgagors before the integrity of the mortgage had been broken, purported to create a further charge on the mortgaged property? If the decisions in *Muhammad Husain* v. *Sheodarshan Das* (3), and *Tarkeshwar* v. *Kalka Pathak* (4) are to be followed, it would seem that the execution of such a tacking bond by one or two of the mortgagors only will not preclude the mortgagors as a body from exercising their right to redeem the earlier mortgage. In those cases, however, it does not appear that the integrity of the earlier mortgage had been broken at the time the suit was brought. It seems to us difficult to say that one mortgagor cannot further burden his own share in the equity of redemption and if the purchaser of that share, after the integrity of the mortgage had been broken, can redeem it without paying such further charge, the mortgagee loses his security for such further charge.

We think that the points of law raised by this appeal are of considerable importance and that it is desirable that they should be determined by a Full Bench of this Court. We accordingly direct that the case be laid before the Hon'ble Acting Chief Justice for the constitution of a Full Bench.

The case was then laid before and heard by a Full Bench.

Mr. *Shiva Prasad Sinha*, for the appellants.

Mr. *Baleshwari Prasad*, for the respondents.

MUKERJI, A. C. J., KING and NIAMAT-ULLAH, JJ. :—This appeal has been referred to a Full Bench because of

(1) (1929) I.L.R., 52 All., 281.
(2) (1930) I.L.R., 5 Luck., 365.
(3) (1907) 4 A. L. J., 176.
(4) A. I. R., 1927 All., 144.

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some difficult points of law involved in it. The facts of the case briefly are these. One Gobind Singh owned a 2 annas 8 pies share in several villages. He had eight sons, namely Rajpal, Ajit, Ramghulam, Dindayal, Ramroshan, Harnam, Ahbaran and Kalu. All the sons except Rajpal made a usufructuary mortgage of a 2 annas 4 pies share for 15 years with one Harmangal Singh. Harmangal Singh is now represented by the defendants in the suit out of which this appeal has arisen. The plaintiff, who is the respondent No. 1 in this appeal, has sued to recover the entire property mortgaged, except a 2 pies share which was purchased by the mortgagee, on payment of a proportionate amount of the mortgage money, which was Rs.600.

The plaintiff is the purchaser of 18 2/7 pies and the share is made up in this way: He purchased the shares belonging to the branches of Dindayal, Ramroshan, Harnam and Ajit. It appears that Kalu's branch became extinct and the 4 pies share belonging to Kalu was inherited by the remaining seven branches. Thus the share of each branch was augmented by 4/7 pies. The four branches who sold their shares to the plaintiff thus became entitled to $4 \times 4/7$ pies in addition to their original shares. Thus the plaintiff has become entitled to 18 2/7 pies.

The plaintiff's suit was met with the plea that at different dates, to be presently mentioned, different branches of the mortgagor's family executed certain deeds by way of a further charge and that the plaintiff could not recover the property claimed without payment of the money borrowed by, and due on foot of, these deeds of further charge. These documents are as follows:—

(1) Mata Prasad Singh, grandson of Ajit, borrowed Rs.99 from Harmangal on the 16th of July, 1884, and agreed to pay interest at 2 per cent. per mensem. The money was repayable, initially, on the 27th of June, 1885, and in any case it was to be paid before the mortgage of 1883 was redeemed.

(2) Deonarain Singh, a grandson of Harnam Singh, and Mata Prasad, a grandson of Ramghulam, mortgaged between them a 4 pies share to Harmangal for Rs.85 on the 6th of September, 1884, and agreed as to payment in almost similar terms to those agreed to by Mata Prasad in document No. (1).

(3) Bishnath and Jageshar Singh, sons of Ramroshan, borrowed Rs.85 from Harmangal on the 11th of April, 1885, on terms similar to the documents Nos. (1) and (2).

(4) Sheokumar Singh, son of Kalu Singh, borrowed Rs.50 from Harmangal on the 4th of September, 1885, on terms similar to the terms of bonds Nos. (1), (2) and (3).

The point that was seriously considered in the courts below was whether these four deeds created any charge on the properties mortgaged in 1883 and, therefore, the moneys due on these bonds were repayable at the time of redemption of the mortgage deed of 1883. The courts below have differed on this point. The learned Munsif was of opinion that documents Nos. (2) and (4) created a charge and documents Nos. (1) and (3) did not. The learned Subordinate Judge held that the documents Nos. (1) and (3) did not create a charge, that document No. (4) did create a charge and document No. (2), although it did create a charge, was not operative inasmuch as when the document was executed the integrity of the mortgage had not been broken.

The documents have been translated for our benefit and we have perused them. They are more or less in the same language and the important portions of the language used are these: "When I redeem my zamindari share in taluqa Bibipur . . . , which is mortgaged for Rs.600 to the aforesaid creditor . . . , I shall first pay this sum of Rs.99, together with interest, and then I shall pay the mortgage money of the zamindari share. Until

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I pay up this amount I shall not sell or mortgage this mortgaged zamindari." This is an extract from the document No. (1). In document No. (2) the following occurs: "When we redeem this mortgage (of 1883) we shall first pay up this amount, principal and interest, at the rate of 2 per cent. per mensem. Until we pay this amount we shall not mortgage or sell the aforesaid zamindari." The following occurs in document No. (3): "When we or our heirs redeem the above-mentioned property (mortgaged in 1883) we shall first pay this sum, together with interest, then the mortgaged zamindari aforesaid will be redeemed. Until the principal and interest of this deed are paid we shall not mortgage or sell the aforesaid property." The following is an extract from document No. (4): "When I redeem the mortgage (of 1883) I shall first pay up this sum, principal and interest, at the rate of 2 per cent. per month. Until I pay up this amount I shall not mortgage or sell the aforesaid zamindari."

The agreement that the mortgagor shall pay the amount due on the subsequently executed bond before he redeems the prior mortgage is an agreement to create a charge on the property previously mortgaged. This was the view taken by their Lordships of the Privy Council in *Aditya Prasad* v. *Ram Ratan Lal* (1). In addition to the language which was found sufficient to their Lordships of the Privy Council to create a further charge, we have got the stipulation on the part of the mortgagors that they would not mortgage or sell the property previously mortgaged till the money due on the subsequently executed document had been paid. The stipulation meant that the previously mortgaged property was made security for the payment of the money subsequently borrowed. We are accordingly of opinion that all the four documents create further charges on the property mortgaged in 1883.

(1) (1930) I.L.R., 5 Luck., 365.

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The learned counsel for the respondents has urged that according to certain facts, which will be presently stated, a sale deed of the 28th of July, 1920, by reason of the fact that it is registered and the four documents Nos. (1) to (4) are unregistered, has a priority over those documents under the provisions of section 50 of the Registration Act. It appears that certain descendants of Gobind Singh belonging to the branches of Dindayal, Ramroshan and Ajit sold their shares by the sale deed of the 28th of July, 1920, for a sum of Rs.700 in favour of Harnam Singh's branch and the plaintiff. The sale deed makes no mention of the four deeds of further charge enumerated above, although it mentions the mortgage of 1883. Jaipal, the plaintiff and one of the purchasers under the deed of 1920, relinquished his rights acquired under the sale deed in favour of his co-vendees (descendants of Harnam's branch). Subsequently the members of Harnam's branch made a mortgage of the property acquired in 1920, and also their original shares, in favour of Jaipal. Jaipal brought a suit for sale on that mortgage and in execution of the decree that followed purchased the property himself. The argument, therefore, was advanced that the sale deed of 1920 for all practical purposes annulled the four unregistered documents. This plea, however, was not raised before the arguments were addressed in the court of the Munsif. The learned Munsif noticed the fact that the plea had been raised very late. The belatedness of the plea precluded the defendants from raising the possible plea that the plaintiff made the purchase of 1920 with notice of the pre-existing unregistered documents. We find that the plaintiff purchased with members of Harnam Singh's branch, and Harnam Singh's branch belongs to the same family to which the vendors belong. It is quite possible, therefore, that Harnam Singh's branch, and through them the plaintiff, were all aware of the existence of the four unregistered documents. The plaintiff, in our opinion, should have raised his plea,

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which he now wants to substantiate, as soon as the defendants pleaded the four unregistered documents. In our opinion we should not allow the plaintiff now to raise the plea.

The next point to be considered is, what is the liability of the property under the four unregistered documents? Mr. *Baleshwari Prasad* has very correctly argued that for the purposes of determining the liability we should separate the several shares which belonged to the several branches. The fact that the defendants, the mortgagees under the deed of 1883, purchased a 2 pies share out of the property mortgaged to them broke up the integrity of the mortgage and, therefore, it is not open to the plaintiff to redeem more than the share purchased by him. That share, as we have already pointed out, is 18 2/7 pies.

The document No. (1), the deed of further charge dated the 16th of July, 1884, was executed by Ajit Singh's branch and, therefore, the original 4 pies share of Ajit Singh can be redeemed only on payment of one-seventh of Rs.600, the mortgage money under the deed of 1883, and the amount due under the document dated the 16th of July, 1884, document No. (1).

Dindayal's original share of 4 pies is free from any further charge, because nobody belonging to his branch ever created any. Therefore the 4 pies share originally belonging to Dindayal may be redeemed on payment of only one-seventh portion of Rs.600.

Ramroshan Singh's original 4 pies share is charged under document No. (3). This will, therefore, be redeemable on payment of one-seventh of Rs.600 plus the amount payable under the document of the 11th of April, 1885.

As to the further charge created by the document No. (2), dated the 6th of September, 1884, that document was executed by two persons, namely Deonarain, grandson of Harnam, and Mata Prasad, grandson of Ramghulam. Ramghulam's 2 pies share is now in the possession

of the defendants mortgagees. Harnam's 2 pies share is liable to be redeemed and it would be redeemable on payment of one-fourteenth portion of Rs.600 plus one-half of the money due under the document No. (2) dated the 6th of September, 1884. The other half of Harnam's original share, namely 2 pies, is redeemable on payment of only one-fourteenth portion of Rs.600.

Kalu's 4 pies share was inherited to the extent of 2 2/7 pies by the four branches of the plaintiff's vendors. Kalu's successors created the further charge under the document No. (4) dated the 4th of September, 1885. The plaintiff would be entitled to redeem this 2 2/7 pies share on payment of four-sevenths share of one-seventh of Rs.600 plus four-sevenths of the amount due under document No. (4) dated the 4th of September, 1885.

We accordingly modify the decree of the courts below and make a decree under order XXXIV, rule 7 of the Code of Civil Procedure and grant six months' time for payment. A fresh decree will be prepared in this Court specifying the several amounts payable under the several documents in accordance with our judgment. The several portions redeemable under our decree will be specified separately, so that the different amounts chargeable to different properties may be clearly specified. Interest at the stipulated rate will be calculated up to the period of six months; thereafter interest will be payable, in case of delay in redemption, at 6 per cent. per annum on the several bonds of further charge.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, Mr. Justice King and Mr. Justice Niamat-ullah

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CHIRANJI LAL (PLAINTIFF) *v.* BANKEY LAL AND OTHERS (DEFENDANTS)*

Hindu law—Joint family property—Alienation by manager, not being the father—Legal necessity must be proved—Doctrine of antecedent debt not applicable.

The question whether a debt is antecedent or not arises only when the father makes a transfer. It is the privilege of the father alone to burden the family estate by a mortgage for discharging an antecedent debt, which must be a debt of his own. A manager of the family, who is not the father, cannot bind the estate merely by discharging a pre-existing debt of the family.

S died leaving three sons, *RP*, *RS* and *Z*. *Z* then died leaving a son *C*, and the joint family then consisted of *RP*, *RS* and *C*. A mortgage of the joint family property was executed by *RP* and *RS*. *Held*, that in the absence of proof of legal necessity the mortgage was not binding on *C* or the family estate, even though the mortgage was made to pay off an earlier mortgage which had been executed by *S* and *Z*.

This appeal was referred by the Division Bench hearing it to a Full Bench with the following referring order :—

YOUNG and THOM, JJ. :—This is a second appeal from the decision of the Additional District Judge of Agra. The plaintiff in this case sued for a declaration that a usufructuary mortgage executed by his two uncles and his own mother as his guardian was not binding on him as there was no legal necessity for the loan. The lower appellate court found that the whole of the mortgage was good against the plaintiff as the money was borrowed to pay off antecedent debts which were binding upon him, that is, that the debts were the debts of his ancestors and that the money borrowed paid these debts off. The appellant's sole contention in this case is that two

*Second Appeal No. 621 of 1931, from a decree of Gauri Prasad, Additional District Judge of Agra, dated the 20th of January, 1931, reversing a decree of Bhagwan Das, Additional Subordinate Judge of Muttra, dated the 29th of November, 1929.

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of the items in the mortgage, namely items (*a*) and (*f*) mentioned on page 16 of the paper book, cannot be binding upon the plaintiff, and he quotes as his authority the case of *Anantu Kalwar* v. *Ram Prasad Tiwari* (1). Shortly it appears to us that that case was wrongly decided and is not in accordance with the well known principles of Hindu law, but as it is a Bench decision we refer this case to the Chief Justice for a Full Bench to be appointed in order to decide this matter.

The case was then laid before and heard by the Full Bench.

Mr. *B. Malik*, for the appellant.

Dr. *N. P. Asthana* and Messrs. *S. K. Dar* and *B. N. Sahai*, for the respondents.

MUKERJI, A. C. J., KING and NIAMAT-ULLAH, JJ. :— This appeal has been referred to a Full Bench, because the learned Judges before whom the appeal came thought that the case of *Anantu Kalwar* v. *Ram Prasad Tiwari* (1) had been wrongly decided.

The suit arose in the following circumstances. A pedigree at page 15 of the printed paper book will show the relationship that existed among the parties to the suit, except the defendant No. 1, who is a transferee.

[An extract from the pedigree is appended below.]

SHIB LAL

Ram Prasad (deceased)	Ram Singh, Dfdt. No. 4	Zabar Singh =Mt. Mahtab Kuar
Kishan Singh, Dfdt. No. 2	Three sons, Dfdts. Nos. 5, 6, 7	Chiranji Lal, plaintiff
Suraj Mal, Dfdt. No. 3		

Ram Prasad, Ram Singh and Mt. Mahtab Kuar, mother of the plaintiff Chiranji Lal, executed a usufructuary mortgage for Rs.12,441 on the 15th of July, 1924. Chiranji Lal brought the suit, out of which this appeal has arisen, to obtain a declaration that the mortgage deed was not binding on him, and he also sued for recovery of possession to the extent of his third share.

(1) (1924) I.L.R., 46 All., 295.

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The first court went into the question of legal necessity and came to the conclusion that there was none except to the extent of Rs.500-4, being a third share of the total amount binding on the whole family. It accordingly directed that the plaintiff should be put in possession of a third share of the property on payment of Rs.500-4.

The plaintiff filed an appeal, and it was heard by the learned Additional District Judge of Agra. The learned Judge came to the conclusion that the mortgage was binding on the plaintiff and he, accordingly, dismissed the suit.

In this Court it has been contended that the learned District Judge misunderstood the law relating to liability of Hindu families, especially that of a Hindu son and a grandson, and his decision is liable to be set aside.

On pages 16 and 17 of the paper book will be found a statement of the items which go to make up the entire consideration of Rs.12,441. As regards the items (*b*), (*c*), (*d*) and (*e*), it is conceded before us that the finding of the learned District Judge that these are sums for which the plaintiff is liable is binding on us. It has been found that certain lands were taken on lease from the creditor, Bankey Lal, by the adult members of the family, for the benefit of the entire family. The two decrees for arrears of rent, which went to make up Rs.757-8, item (*b*), were decrees for which the entire family was liable. Similarly, it has been found that for the arrears of rent amounting to Rs.380-12, item (*d*), the whole family was liable. It has also been found that the simple money bonds, which went to make up the amount of Rs.905, item (*e*), were executed in order to pay off arrears of rent due. As regards item (*c*), the decree of the Munsif was against the plaintiff, Chiranji Lal, himself. It is, therefore, binding on him. The last item (*h*) has also been found to be binding. The item (*g*) was due on a decree which was binding on the plaintiff himself. Therefore, it is binding on the plaintiff, and he cannot go against it.

There remain now the two items (*a*) and (*f*), which require consideration. These are two mortgages, executed by Shib Lal, the grandfather of the plaintiff, and Zabar Singh, the father of the plaintiff. The learned District Judge held that as they constituted antecedent debts it was open to the uncles of the plaintiff Chiranji Lal to execute a mortgage to pay off those debts. The learned District Judge did not consider whether the mortgages (*a*) and (*f*) were or were not supported by legal necessity.

The question whether a debt is antecedent or not arises only when the father makes a transfer. Their Lordships of the Privy Council, in the well known case of *Brij Narain* v. *Mangal Prasad* (1) laid down five propositions of law which would be found printed at page 104. The first proposition is as follows: "The managing coparcener of a joint undivided estate cannot alienate or burden the estate *qua* manager, except for purposes of necessity." This rule applies equally to all members of the family, even where the managing member is the father. In the case of the father, there are certain special privileges which we shall notice later on. In the case before us the transferors, who professed to act on behalf of the family, were two uncles of Chiranji Lal, and they can bind the estate only by proving legal necessity.

The second proposition laid down by their Lordships of the Privy Council is as follows: "If he is the father and the reversionaries are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt." This relates to the case of a simple debt incurred by the father.

The third proposition is as follows: "If he" (father, who is alienating the property) "purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate."

(1) (1923) I.L.R., 46 All., 95.

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It will be noticed that it is the privilege of the father alone to burden the family estate by a mortgage, by discharging an antecedent debt, which must be a debt of his own. A manager of the family, who is not the father, cannot bind the estate merely by discharging a pre-existing debt of the family.

In the case before us it is not the father of Chiranji Lal, nor the grandfather of Chiranji Lal, who made the alienation impeached, namely the mortgage of the 15th of July, 1924, and, therefore, the adult male members, namely Ram Prasad and Ram Singh, could not create a valid mortgage binding on the estate, simply because there existed a debt incurred by Shib Lal or Zabar Singh. In this view the ground on which the learned Judge based his decision cannot be upheld.

It becomes necessary to find out whether the mortgages of the 12th of July, 1919, item (*a*), and of the 1st of September, 1916, item (*f*), were executed for legal necessity binding on the family. We shall have to remit issues on this point.

Before we part with the case and direct the issues to be remitted, we might say a few words about the decision in *Anantu Kalwar* v. *Ram Prasad Tiwari* (1), because the learned Judges, before whom this case came initially, doubted the correctness of that decision. In that case the sale in question was executed by two persons, Sahadeo and Ram Das. It was executed on the 30th of June, 1910. Sahadeo and Jagat were brothers. Jagat's sons were Ram Das and Ram Prasad, and Sahadeo's sons were Ram Rup and Lalji. The two sons of Sahadeo and Ram Das's brother Ram Prasad brought a suit to obtain a declaration that the sale of the 30th of June, 1910, was not binding on them, it not having been executed for legal necessity. This Court found that the transfer by Sahadeo and Ram Das had wiped out a mortgage executed previously by Sahadeo and Jagat, and, therefore,

(1) (1924) I.L.R., 46 All., 295.

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the sale by Sahadeo was to pay off his antecedent debt. It was accordingly held that the transfer, so far as Sahadeo was concerned, was binding on his sons, Ram Rup and Lalji. As regards the transfer by Ram Das, it was held that Ram Das was bound by his own transfer, but Ram Prasad was entitled to have his fourth share recovered for himself. It was pointed out that, although there was a pre-existing debt incurred by Jagat, Ram Das or Sahadeo could not make a transfer without establishing a case of legal necessity. This view is quite in accordance with the view which we have expressed above. We are, therefore, of opinion that the decision as regards the binding character or otherwise of the transfer of the 30th of June, 1910, is not incorrect.

We send down the following issues to the court below for a decision. Parties will be allowed to adduce fresh evidence, and 10 days will be allowed to file objections :—

(1) Whether the mortgage of the 12th of July, 1919, was executed for legal necessity.

(2) Whether the mortgage of the 1st of September, 1916, was executed for legal necessity.

MISCELLANEOUS CIVIL

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Rachhpal Singh

SURAJPAL SINGH (PLAINTIFF) *v.* JAWAHAR SINGH (DEFENDANT)*

1933 *January*, 17

Agra Tenancy Act (Local Act III of 1926), *section* 3(4)—*"Sayar"—Weighment dues—Agra Tenancy Act (III of* 1926), *section* 267(2)—*Reference to High Court—Procedure —Jurisdiction—Civil and revenue courts.*

Weighment dues,—i.e. money paid by the person who is licensed by the landholder or the lambardar to exercise his profession of weighing the goods of the tenants within the zamindari of the licensor and who in plying his profession uses the land of the zamindar and has, therefore, to pay this money for

*Miscellaneous case No. 562 of 1932.

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the license,—came within the definition of "sayar" in section 3(4) of the Agra Tenancy Act, and a suit for recovery of weighment dues is cognizable by the revenue court.

A suit to recover weighment dues was filed in a civil court, and the plaint was returned for presentation to the revenue court. It was then filed in the court of an Assistant Collector, who decreed the suit. On appeal the Collector was of opinion that the suit was not cognizable by the revenue court, and "allowed the appeal" without saying whether he dismissed the suit or directed the plaint to be returned. A revision was presented to the Commissioner to be forwarded to the Board of Revenue. Thereupon the Commissioner directed the Collector to make a reference to the High Court under section 267(2) of the Agra Tenancy Act, and a reference was made accordingly. *Held* that although the procedure adopted was not strictly justifiable by the letter of the law, yet in substance it was right, and the reference should be entertained.

Dr. *N. P. Asthana*, for the plaintiff applicant.

The opposite party was not represented.

MUKERJI, A. C. J., and RACHHPAL SINGH, J. :—This is a reference by the Collector of Aligarh under section 267(2) of the Agra Tenancy Act in the following circumstances. The plaintiff, Raja Suraj Pal Singh, brought a suit for recovery of certain weighment dues from the defendant on the allegation that the defendant took a lease for the dues for 1335 Fasli in the village of Kailaura and failed to pay the said dues as agreed upon. The suit was filed in the first instance before the Munsif of Agra who returned the plaint for presentation to the proper court, the learned Munsif being of opinion that the suit was cognizable by the revenue court inasmuch as the weighment dues were in the nature of a "sayar" income. The learned Assistant Collector who heard the suit decreed it in part. No question of jurisdiction was raised before the learned Assistant Collector.

An appeal was filed before the Collector of Aligarh, who, being of opinion that the claim did not fall within the definition of "sayar" income, "allowed the appeal", but he did not say whether he dismissed the suit or whether he

directed the plaint to be returned to the plaintiff for presentation to the proper court. The learned Collector evidently overlooked the very salutary provision of section 267, sub-section (2), which says that where once a civil court or a revenue court directs that a plaint should be returned for presentation to a revenue court or to a civil court, the court receiving the plaint, if it disagrees with the former court, should submit the record, with a statement of its reasons for disagreement, to the High Court. If this procedure had been followed by the learned Collector, his ultimate decision would have been in accordance with the decision of this Court. However, as we have said, the learned Collector "allowed the appeal". A revision was filed before the Board of Revenue, but, as we understand the practice is, it was presented before the Commissioner to be forwarded to the Board of Revenue. The Commissioner wanted to follow the procedure laid down in section 267, sub-section (2), and, therefore, directed the Collector to make the reference. The reason probably was that the Commissioner, as Commissioner, was not properly seised of the case, and it was in the court of the Collector that the question of jurisdiction had been raised. The procedure adopted by the learned Commissioner cannot perhaps be strictly justified by the letter of the law, but we think that in substance it was right. We accordingly entertain the reference. We may note that the learned Collector in his letter of reference is not quite accurate when he says that the "revisional application was dismissed by the Commissioner on the 29th of July, 1932". We have got that order of the Commissioner before us. There is nothing in it to suggest that the Commissioner has dismissed the revision. To start with, it would not be for the Commissioner to dismiss the petition of revision inasmuch as it is for the Board of Revenue to pass the final orders, and secondly, the Commissioner nowhere says that the petition should be dismissed. If the petition had been dismissed, we would not probably have taken the trouble to go into the merits of the case, because our opinion is meant

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to be a guide to the revenue or civil court, as the case may be, and it is not to be given merely as a matter of academical interest.

Coming to the merits of the case, it appears to us that the weighment dues do come within the definition of "sayar" as contained in section 3, clause (4) of the Agra Tenancy Act. It will be noticed that the definition of "sayar" as given there is not exhaustive. It is only illustrative. It runs as follows: "'Sayar' includes whatever is to be paid or delivered to a landholder by a lessee or licensee on account of the right of gathering produce, forest rights, fisheries, tanks not used for agricultural purposes, the use of water for irrigation, whether from natural or artificial sources, or the like."

As we understand by the expression "weighment dues", it is money paid by the person who is licensed by the landholder or the lambardar to exercise his profession of weighing the goods of the tenants within the zamindari of the licensor. The licensee in plying his profession uses the land of the zamindar, and, therefore, he is called upon to pay some compensation to the zamindar. The majority of the people living in a village are agriculturists and mostly deal in agricultural produce that is weighed by the weighman, the licensee. In the circumstances, we are of opinion that we ought to class the weighment dues as "sayar". This, accordingly, is our opinion on the reference.

We direct that a copy of this judgment under the seal of the Court be sent to the learned Collector of Aligarh for his information. Nobody has appeared on the other side and we make no order as to costs of the reference.

APPELLATE CRIMINAL

Before Mr. Justice Young and Mr. Justice Thom

EMPEROR *v.* SHUKUL AND OTHERS*

1933 *January*, 19

Criminal trials—Duties of prosecution and of courts—Identification by witnesses—Mode of conducting identification—Witness—Whether a witness falsely implicating one accused should be believed as against others—Oath, efficacy of.

In a case of communal rioting with murder 83 persons were committed by the Magistrate for trial, of whom 32 were convicted by the Sessions Judge. 7 of them were sentenced to death, among them being one Shukul. The evidence of 17 principal witnesses went to show that this Shukul was the leader and most active member of the mob, that he scaled high walls, climbed on roofs and acted like a man of powerful physique and athletic prowess and agility. During the hearing of the appeal in the High Court Shukul appeared in Court and was seen to be a wizened and decrepit old man of 70, unable to stand erect; and a medical examination revealed that on account of a peculiar bony formation of his left foot he was unable to stand erect, much less run about or climb roofs, and was a weak, done old man, and that his condition had been the same two or three years ago. The Court thereupon held that the 17 witnesses had committed perjury in respect of their statements regarding Shukul, and no reliance could, therefore, be placed upon their evidence as against the other accused; and as the other evidence in the case was unsatisfactory, the Court acquitted all the accused. In their judgment the High Court made the following observations :—

The duty of the police in the investigation of any crime is to discover the truth and not simply to obtain evidence for the purpose of securing a conviction. It is the duty of the prosecution to lay before the court all the evidence, even though some of that evidence may be in favour of the accused person and may result in an acquittal.

It is the duty of the committing Magistrate and the trial Judge to be solicitous in the interests of the accused. They should take great pains to examine the evidence minutely in considering the prosecution case, especially where

*Criminal Appeal No. 423 of 1932, from an order of W. Y. Madeley, Sessions Judge of Benares, dated the 2nd of May, 1932.

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there is a large number of accused. It is emphatically the duty of the Magistrate who commits or the Judge who convicts to see each of the accused before he commits or convicts.

In certain instances, where a witness was unable to pick out a particular accused he had named from amongst the accused persons, the accused person or persons whom it was desired that the witness should identify were asked to stand up and, in one case, also made to give their names, and the witness then identified the accused: This procedure reduced the identification to a mere farce and identification thus obtained was worthless.

In cases where there is reason to believe that certain accused, on the ground of enmity or otherwise, *may* have been falsely charged, then the evidence of those witnesses who have reasons falsely to implicate the particular accused should not be relied on as against that particular accused; on the other hand, the same witnesses might be relied upon against other accused where there is no reason to suspect enmity on the part of the witnesses. Where, however, perjury has definitely been brought home to a witness, it would be extremely dangerous to rely on his evidence against any one. If a witness lies as against one person, his evidence against another should not be relied upon.

There is no religious sanction behind the oath as at present administered to Indian witnesses. A binding oath with religious sanction behind it is one of the foundations of the administration of justice.

Dr. *S. N. Sen*, Mr. *F. Owen O'Neill*, Dr. *K. N. Malviya* and Messrs. *A. M. Gupta* and *Gajadhar Prasad Bhargava*, for the appellants.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

YOUNG and THOM, JJ. :—The appellants in this case are 31 in number. They have been tried in the Sessions Judge's court of Benares for offences under sections 148, 302/149 and 307/149 and 147 of the Indian Penal Code.

* * * * * *

Seven of them have been convicted and sentenced to death under section 302 of the Indian Penal Code and to transportation for life under section 307 of the Indian Penal Code and the rest to transportation for life and

various terms of rigorous imprisonment under section 148 of the Indian Penal Code.

* * * * * *

The offences with which the accused have been charged and convicted are alleged to have been committed in the village of Raiya, police station Punnuganj, on the 16th of March, 1931.

The riot, in which four persons were killed and two seriously injured, was the result of bitter communal antagonism in the district. For some considerable time before the riot hostility between the Muhammadans and the Hindus had been smouldering. Two days before, that is, on the 14th of March, 1931, this hostility flared up in the neighbouring village of Manchi where a riot occurred, the Hindus attacking the Muhammadans. It is unnecessary to go in detail into the events leading up to this riot. These are described by the learned Sessions Judge of Benares in his judgment in the Manchi riot case. Suffice it to refer to the fact that feelings for some time between the two sections of the community had been running high and that the immediate cause of the outburst was the alleged killing of a cow by one Muhammad Raza. The Hindus were determined to avenge the sacrilege and the riot in Raiya in which the accused are alleged to have participated was really a continuation of the riot in Manchi on the 14th of March, 1931. It appears that the Hindus had determined to attack the Muhammadans of village Raipur, which is about one mile distant from the village of Raiya, because the leading Muhammadan in Raipur, Imam Bakhsh, gave shelter to Muhammad Raza who was said to have killed the cow and who succeeded in making good his escape from Manchi on the 14th.

* * * * * *

A large number of the Hindus were rounded up by the police in the village of Raiya and were taken to the thana. The list of their names is Exhibit Y. From these persons the police collected a large number of weapons, axes, spears and *lathis*. No attempt has been made, however,

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to prove that any of these weapons was the property of the accused.

A hundred Hindus were subsequently challaned by the police. Ninety-nine appeared before the committing Magistrate who discharged 16 and committed 83. During the course of the trial before the Sessions Judge one accused died. The Sessions Judge acquitted 50 of the charges which were preferred against them and convicted 32. Seven of these have been sentenced to death and the remainder to transportation for life.

This case presents certain special features to which, in view of our decision, we desire at this stage to make reference :—

(1) In this case the prosecution has relied almost entirely upon the oral testimony of the prosecution witnesses. Their evidence has not been supplemented or supported by facts and circumstances such as, for example, the recovery of arms or blood-stained garments. As has been stated above, no attempt was made to identify any of the weapons taken possession of by the police as the property of the accused, and although firearms are alleged to have been freely used, none appear to have been recovered.

(2) The Pandeys of the village of Khalyari who have been convicted and sentenced are all related, being descended from a common ancestor. None of the Pandeys of Khalyari, who, according to the witnesses, took a prominent part in the riot, were rounded up by the police in Raiya and taken to the thana and their names do not, therefore, appear in Exhibit Y already referred to. This is an extraordinary circumstance.

(3) The prosecution witnesses are practically all Muhammadans and many of them are related to Imam Bakhsh, the leading Muhammadan in Raipur where he is known as the Bara Babu. We

append to our judgment a chart showing the relationship of these witnesses.

(4) Between many of these witnesses and a number of the accused there had been long standing enmity—an enmity which is evidenced by numerous civil and criminal actions. We append to our judgment a chart setting forth these actions. If litigation is proof of enmity between witness and accused, enmity, bitter and long standing, has been established in this case.

(5) Two reports were made to the police purporting to give the names of those who took part in the riot. One report is by the witness Ismail, son of Imam Bakhsh, and the other by the witness Ali Husain, brother of Imam Bakhsh. The persons named in these reports, Ismail and Ali Husain say they recognized during the course of the riot. Both reports include a very large number of names and it is impossible to believe that the witnesses recognized and remembered so many of the rioters. Ismail names 60 persons; Ali Husain 90. Both reports were made to the police *two* days after the riot.

The facts above referred to are sufficient to rouse the suspicion that the Muhammadan witnesses may have falsely named a large number of innocent persons. During the course of the hearing of these appeals this suspicion was confirmed by the appearance in court of the appellant Shukul, who had applied to be present.

Shukul is one of the accused who has been condemned to death. As no fewer than 17 witnesses have testified to his having taken part in the riot, and as the view we take of the evidence against him and of his conviction and sentence has so important a bearing upon our decision in all these appeals, we think it proper to set forth *in extenso* what the learned Sessions Judge has said about

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his case in his judgment. The learned Judge deals with the case of Shukul at page 233, Volume 2. He states:

"Imam Bakhsh saw the accused on the *mardana* roof. Raghonath says he came to his door along with others taking the crowd to Raiya. Shukrullah saw him among the pursuers of the Mussalmans and mentioned him in the first report. Ali Husain saw him among the rioters. Taj Uddin saw the accused on the northern roof with an axe. Habiban saw accused pursuing Ramzan and Saham Ali. Rajmati corroborates her. Razzaq saw the accused on the roof of the northern room. Tafazzul also saw accused on the roof. Abhaiman says accused took him from his well where he was working. Idan saw him on the roof. Sita Ram saw him running off. Gaya Koeri also names him. Ram Dhani says he was one of the riotous crowd which went to Raipur. Shukul says he was one of those who persuaded witnesses to go to Raiya and that he saw him in Raiya. Jhuri also names him. Farzand says he saw this accused in front of the *baithak*. There is a good deal of discrepancy as to the weapon with which this accused was armed. He is mentioned as being armed with a gun by many witnesses, with an axe by several, and with a sword by one at least. There can be no doubt at all of his presence in the riot. The most that can be said is that he might possibly be given the benefit of the doubt as to what arms he had in his hand. Personally I have no doubt that he was armed with a gun at some time during the riot. Rajmati, who in examination-in-chief, is in clear conflict with Habiban, seems to mean in cross-examination that he had a gun. The same confusion has arisen in the case of Tika who is proved beyond doubt to have shot Farzand and Ramzan. Shukul took a leading part in the riot. Shukul pleads *alibi* in Jadunathpur, district Shahabad. Shukul produced one witness, who denied all knowledge. One of the assessors finds him guilty and two give him the benefit of the doubt. There is no doubt. I, therefore, agreeing with one and disagreeing with two of the assessors convict Shukul of the offences with which he is charged."

It appears, therefore, that no fewer than 17 witnesses have testified against this accused, and if their evidence is to be accepted, Shukul was the leader of the riot. We have very carefully considered the evidence against this accused. He is represented as the moving spirit and the

most active member of the riotous mob. According to the witnesses, in an attempt to induce those people unwilling to accompany the mob he instructed, exhorted, cajoled and threatened. He led the mob from Khalyari to Raipur and from Raipur to Raiya, a distance of 5 miles. From beginning to end he was in the forefront of the riot. He was here, there and everywhere,—urging, leading and directing the mob. He chased the fleeing Muhammadans through the streets of the village of Raiya and led the attack on Raghunandan's house. He climbed on the roof of the house not once but several times. The walls of the house, we have been told, are about 10 feet high. The roof is sloping and tiled. He clambered up the tiles and along with others tore some of them off in an attempt to make a hole in the roof through which he could shoot the Muhammadans who had taken refuge in the house. At one time he is said to be armed with a gun, at another with an axe, at another with a sword. He fired his gun on several occasions whilst on the roof and whilst descending from the roof. It was he who, according to the evidence in the Manchi riot case, took one of the most prominent parts in the riot in that village on the 14th of March. If the evidence against him is reliable he is a man of powerful physique, untiring energy, exceptional endurance, possessed of the strength and prowess of an athlete and the agility of an acrobat.

When Shukul appeared before us in Court he had practically to be carried in by two police constables. He is a wizened old man of about 70 years of age. He is in the last stages of senility and physical decrepitude; he is unable to stand erect. He has little power of movement and he is just able to hobble slowly about. In view of the weight of the evidence to the effect that he was the leader of the riot, and of the fact that so many witnesses had testified on oath to the extraordinary feats he performed during the course of the riot, we considered it advisable to have him examined by the Civil Surgeon of Allahabad. We append a copy of the Civil Surgeon's

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evidence upon his condition to this judgment. In the course of his evidence the Civil Surgeon states: "Shukul is a weak, done old man. He is unable to run. His muscles are very weak and flabby and he is unable to adopt by himself the erect posture. His condition now is about the same as it has been for the last two or three years. Two years ago it would have been impossible for him to climb upon the roof of a house or to run about the village of Raiya chasing Muhammadans. If he were left to himself today he might be able to hobble along for 2 or 3 miles and this would take him the better part of the day. His ability to move about would be the same as two years ago. He has two extra sesamoid bones in his left foot. These bones are so placed as to cause him pain when he uses his foot in the ordinary manner."

In addition to having this accused examined by the Civil Surgeon we called for reports from the Superintendents of the District Jails of Mirzapur and Benares, where he has been incarcerated since his arrest. There is no mention in these reports of his having suffered from any illness or physical deterioration during his imprisonment.

During the hearing of these appeals the prosecuting inspector, who was present when the case was being heard before the committing Magistrate and during the course of the trial in the court of session, has informed us that the man who appeared before us as Shukul Pandey is the same man who was arrested after the riot and who appeared before the committing Magistrate and who was tried, convicted and sentenced upon the evidence to which we have already referred, in the sessions court.

As has already been mentioned, this accused was alleged to have taken a prominent part in the Manchi riot. In connection with that riot he was tried, convicted and sentenced to transportation for life. On appeal to this Court, however, he was acquitted. We have examined the file in the Manchi riot case. We find that he was

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convicted in that case upon the evidence of two witnesses Dukhi and Mt. Bachchi. According to Mt. Bachchi, Shukul was one of the men who entered the house in which Rasul, one of the men who was murdered in the course of the Manchi riot, had taken refuge, and he assisted in dragging Rasul out. It appears from the judgment in the Manchi riot case that the witness Dukhi in identification identified Sumer Pandey as Shukul Pandey. Sumer Pandey is a man of between 30 and 40 years of age. Shukul Pandey is a decrepit old man of about 70. No one who had seen Shukul Pandey in a mob could honestly mistake him for Sumer. In this connection we would note further that Shukul is mentioned in the first information report and also in the statements which the learned Sessions Judge regards as confessions made by the accused Mauj, Damri, Harnandan and Misri under section 164 of the Criminal Procedure Code. These statements were subsequently retracted, the accused alleging that they were made as the result of pressure and ill-treatment on the part of the police. The fact that Shukul, who, for the reasons we have already given, could not have taken part in the riot, is mentioned in these statements supports the allegation that they were not made voluntarily.

In view of all these facts there is no doubt left in our minds that Mt. Bachchi and Dukhi in the Manchi riot case and the 17 witnesses who testified against Shukul in the present case have been guilty of the grossest perjury and have implicated this accused falsely. Mt. Bachchi also gave evidence against some of the accused in this case.

We find it impossible to understand how Shukul was ever challaned in connection with this case. It must have been clear to the police that it was absolutely impossible for him to have taken part in the riot at all. We have been told that on his arrest he was conveyed to the police station in a motor car. We are equally at a loss to understand how he was committed for trial by the

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committing Magistrate. His appearance should have been sufficient to have convinced the committing Magistrate that the prosecution case against him was completely false. Further, we are unable to understand how he came to be convicted by the learned Sessions Judge. If the learned Sessions Judge had seen the man whom he was condemning to death he could not have failed to have been convinced that the evidence against him was false from beginning to end.

We now consider the bearing of the clearly false implication of Shukul upon our decision in the appeals of the other accused. So far as Shukul is concerned, we unhesitatingly acquit him, finding that the case against him is false. Seventeen witnesses have sworn on oath that he took an active part in the riot. These 17 witnesses are guilty of perjury. They have given false evidence against one accused charged with murder. We have come to the conclusion that we cannot rely upon their evidence as against the other accused. We refuse to believe their testimony against any of the accused. For the same reason we refuse to accept the testimony of Mt. Bachchi, who gave evidence against Shukul in the Manchi riot case and whom the learned Sessions Judge in this case regards as a good and reliable witness. Mt. Bachchi has clearly been guilty of perjury against Shukul in the earlier case. We decline to accept her testimony against any of the accused in the present case.

The prosecution has called in this case 46 witnesses, apart from those who are formal. Of these 18 must be discarded as "Shukul" witnesses. Of the rest only Mt. Gulzari, Nur Muhammad, Bhola, Akhtar Ali, Majid, Guput, Bismillah and Kishun escaped criticism by the Sessions Judge. Most of the criticism is serious as will be seen from the appendix to this judgment. * * * * * It will thus be seen that there is really no evidence on which this Court can rely. The learned Sessions Judge has refused to rely on witnesses whom he has severely criticised in the cases of some accus-

ed, but has relied upon the same witnesses against others without giving any reason for his action. We cannot find any reason either. For example, in the case of the accused Sarangi, whom the learned Sessions Judge has acquitted, the witnesses are Imam Bakhsh, Ali Husain, Ismail, Sita Ram and Jhuri. None of these witnesses are, according to the Judge, first class witnesses, and some have been severely criticised, and therefore he states that there is doubt about Sarangi having taken part in the riot and he gives this accused the benefit of the doubt. In considering the cases of some of the other accused, however, the learned Judge has relied upon the evidence of these same witnesses and has recorded a conviction. This is only one example. There are others.

For the sake of convenience we append to our judgment a chart prepared at our request, showing the criticisms of the learned Sessions Judge of the witnesses in this case. On the evidence of these witnesses the learned Sessions Judge has acquitted in some cases but convicted in others.

The result is that we are compelled to allow all the appeals and set aside all the convictions and sentences. No doubt some guilty persons are thus set free and some murderers go unpunished, but to find any particular person guilty in this case upon such evidence would be a sheer gamble.

In view of the circumstances of this case and of the decision at which we have arrived we consider it expedient to make certain general observations with regard to the administration of justice :—

(1) The duty of the police in the investigation of any crime is to discover the truth and not simply to obtain evidence for the purpose of securing a conviction.

(2) It is the duty of the prosecution to bring out in evidence everything in favour of an accused person and to lay before the court all the evidence even though some of that evidence may result in an acquittal.

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(3) It is the duty of the committing Magistrate and the trial Judge to be solicitous in the interests of the accused. This is especially so in riot cases where the accused are generally humble and ignorant people unable to defend themselves, and often inadequately represented in the courts. (Under Indian law they are not even allowed to give evidence for themselves. If Shukul could have been put in the witness-box the whole aspect of the case for the prosecution would have been changed.) Had the committing Magistrate and the learned Sessions Judge in this case observed this rule the accused Shukul Pandey would never have been committed for trial or convicted. We recognize the difficulties of the Judges in the lower courts, especially in cases such as the present where there is a large number of accused. But it is just in these cases that Judges should take great pains to examine the evidence minutely in considering the prosecution case, with a view to protecting the accused. We would state further that it is emphatically the duty of the Magistrate who commits or the Judge who convicts to see each of the accused before he commits or convicts and passes sentence. If the learned Sessions Judge had appreciated the condition of Shukul Pandey, we are convinced he would never have convicted him and sentenced him to death. It is to be noted that in the lower courts counsel for Shukul never drew the attention of the court to the condition of his client. The point was taken for the first time in this Court. This is one of the amazing facts of this case.

(4) We are of opinion that in many cases sufficient importance is not attached to the identification of accused by witnesses in the trial court. In the present case it appears that in certain instances a witness was unable to pick out a particular accused he had named from amongst the accused. When this occurred, the accused person or persons whom it was desired that the witness should identify were asked to stand up, and in one case, at any

rate, made to give their names. The witness then identified the accused.

This procedure reduces identification to an utter farce. Identification by a witness thus obtained is worthless. We note here some examples of the method that has been adopted in the sessions court:

(i) "(Picks out all except Dangai and Saggam's brother, Hira Lal, and Saggam. Also at first he picked out Mahesh for Sadhu but then picked out Sadhu correctly. *Dangai, Saggam and Hira Lal made to stand up.*) 'These are Dangai, Saggam and Saggam's brother.' (Picks them out correctly.)"

(ii) "(Picks out Morahu only.) 'Before the lower court I recognized only Morahu and Baijnath. Now I only *recognize Morahu.*' (*Baijnath made to stand up.*) 'This is Baijnath.' "

(iii) "(Witness fails to identify accused. Panaru, Misri and Banwari made to stand up *and give their names.*)

Q.—Do you recognize these men?

A.—Yes."

We are amazed that such procedure was tolerated by the Sessions Judge or allowed to pass without objection or comment by counsel for the accused.

(5) It was argued by counsel for the Crown that even though the "Shukul" witnesses had committed perjury in their evidence against Shukul their evidence ought to be taken into consideration against other accused. It was contended that this was in accordance with the general practice in the courts in India; that in most criminal cases false evidence was given on one side or the other or even on both; that if prosecution witnesses were discredited as against all the accused because they had committed perjury in the case of some accused, prosecutions in India would seldom be successful and criminals would escape punishment.

It is unfortunately true that in India it is often the practice for complainants to implicate their enemies

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falsely in criminal cases. This, of course, makes the trial of accused persons a matter of great difficulty and anxiety to all Judges. We think, however, that the argument of counsel is too broadly stated. It is seldom that the court can come to a definite conclusion that perjury has been *proved* to have been committed by particular witnesses. The correct procedure, in our opinion, is that in cases where there is reason to believe that certain accused, on the ground of enmity or otherwise, *may* have been falsely charged, then the evidence of those witnesses who have reasons falsely to implicate the particular accused should not be relied on as against that particular accused; on the other hand, the same witnesses might be relied upon against other accused where there is no reason to suspect enmity on the part of the witnesses. Where, however, perjury has definitely been brought home to a witness, it would be extremely dangerous to rely on his evidence against any one. This proposition is frequently stated as follows: "If a witness lies as against *A* his evidence against *B* should not be relied upon without corroboration." We do not think there is much difference in this way of stating the proposition. The *effect* is the same; the evidence of the witness is in reality *not* relied upon. We cannot see why such a witness should be believed on oath at all.

This case brings into sharp relief the futility of the oath as at present administered to Indian witnesses. We have frequently been assured by Indian counsel of great experience that this oath is, in the case of many Indian witnesses, of no binding effect; and indeed that is our own experience. There is a common phrase in this province which clearly illustrates this: "*Sach bolo; adalat men nahin ho*", that is, "Speak the truth; you are not now in a court of law." There is behind the present oath no religious sanction. Further, witnesses know that courts hesitate to put the law in motion against perjurers. The courts in India are so greatly in arrear with work as it is, and the increase of work, if prosecutions for perjury

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were regularly instituted, would be extensive. There is thus little penal sanction behind the oath either. A binding oath with religious sanction behind it is one of the foundations of the administration of justice. We think if there were such an oath in India, especially in the case of villagers who provide 90 per cent. of the witnesses in criminal cases, perjury would be no more prevalent than elsewhere; and the difficulty in trying such cases would largely disappear. The pressure on the courts of justice of the mass of litigation of all kinds would also be reduced. Fewer false cases would be brought, and, if brought, fewer witnesses would be found to support them.

We now deal with the cases of individual appellants.

* * * * *

In the result, for the reasons given, we set aside the convictions and sentences of all the appellants and direct that they be set at liberty forthwith.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Kisch

ADYA PRASAD SINGH (JUDGMENT-DEBTOR) *v.* LAL GIRJESH BAHADUR (DECREE-HOLDER)*

1933 *January*, 19

Civil Procedure Code, order XXI, rule 2(1)—*Decree-holder certifying payment—No "application" involved—Application to take a step in aid of execution—Limitation Act (IX of* 1908), *article* 182(5)—*Application by judgment-debtor filing a letter of decree-holder agreeing to give time—Acknowledgment—Limitation Act (IX of* 1908), *section* 19.

The terms of order XXI, rule 2(1) of the Civil Procedure Code involve no application, and the mere certification by the decree-holder of a payment of money under the decree is not an application to take some step in aid of execution of the decree within the meaning of article 182(5) of the Limitation Act, even if an "application", in the form of a

*First Appeal No. 57 of 1932, from a decree of Muhammad Junaid, Subordinate Judge of Basti, dated the 16th of January, 1932.

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petition, is made by the decree-holder certifying the payment. *Chote Singh* v. *Ishwari* (1) and *Lecky* v. *Bank of Upper India* (2) dissented from.

An application was made by a judgment-debtor praying that the letter attached thereto and written by the decree-holder, agreeing to give an extension of time to the judgment-debtor in respect of the money due under the decree, might be placed on the record. The application began by a reference to the number of the case and the names of the parties, describing them as decree-holder and judgment-debtor, respectively. *Held* that the application, by itself, amounted to an acknowledgment, within the meaning of section 19 of the Limitation Act, that the applicant was a judgment-debtor of the opposite party in the specified suit and that the decree was unsatisfied; and when read with the letter, a clear admission was added that the applicant owed money under the decree and had obtained time from the decree-holder for making further payment.

Dr. *N. P. Asthana* and Mr. *B. N. Sahai*, for the appellant.

Mr. *Kamla Kant Verma*, for the respondent.

NIAMAT-ULLAH and KISCH, JJ. :—This is a judgment-debtor's appeal and the only question to be considered is one of limitation.

The decree-holder obtained a final decree for Rs.33,330-4 on the basis of a mortgage. He put the decree into execution and realized the sum of Rs.20,777. The final order on this application for execution was passed on the 10th of May, 1928. The application for execution which has given rise to the present appeal was made on the 31st of July, 1931, that is more than three years from the date of the final order on the previous application. The decree-holder, however, contended that limitation was saved by certain proceedings that took place in the execution court on the 15th of September, 1929. On that date the parties appeared before the court. The judgment-debtor paid the sum of Rs.12,000 to the decree-holder in court and was granted a receipt for the amount. The decree-holder

(1) (1910) I.L.R., 32 All., 257. (2) (1911) 8 A.L.J., 487.

thereupon presented an application to the court praying that the said payment be certified under order XXI, rule 2 of the Code of Civil Procedure. The payment was duly certified accordingly. At the same time the judgment-debtor presented to the court a letter written by the decree-holder to the effect that it had been settled between the parties that no further execution should be taken out in respect of the money due under the decree before the end of 1930. This letter was accompanied by an application by the judgment-debtor stating that he was filing the original letter written by the decree-holder relating to extension of time and praying that it be placed on the record.

In the light of these proceedings it was contended by the decree-holder :—

Firstly, that his application for the payment of Rs.12,000 to be certified by the court was an application to take a step in aid of execution within the meaning of sub-clause (5) of article 182 of the first schedule of the Limitation Act and, therefore, his present application for execution was within time.

Secondly, that the application of the judgment-debtor accompanied by the letter of the decree-holder granting time to the end of 1930 was an acknowledgment of liability in respect of the amount due under the decree within the meaning of section 19 of the Limitation Act and so gave rise to a fresh period of limitation.

Thirdly, that the payment of Rs.12,000 by itself gave rise to a fresh period of limitation under section 20 of the Limitation Act, inasmuch as the payment was acknowledged by the judgment-debtor by writing over his signature on the receipt issued by the court for the payment made before it that he had received his portion of the receipt.

The learned Subordinate Judge has accepted all the contentions of the decree-holder and dismissed the judgment-debtor's objection that the application for

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execution was time barred. The correctness of the view taken by the court below on each of the three points has been questioned before us.

With regard to the first point, in our opinion the finding of the court below cannot be upheld. It is true that in certain cases this Court, as well as other High Courts in India, had taken the view that an application by the decree-holder certifying a payment out of court and praying that such payment be recorded by the court is an application to take a step in aid of execution. *Chote Singh* v. *Ishwari* (1) and *Lecky* v. *Bank of Upper India* (2) cited by the court below are two of such cases. In our opinion these decisions can no longer be regarded as laying down good law in view of the decision of their Lordships of the Privy Council in *Shri Prakash Singh* v. *Allahabad Bank* (3). In that case it was laid down that "the mere certification by the decree-holder of a payment to him out of court by the judgment-debtor under order XXI, rule 2(1), is not an application within the meaning of article 181 of schedule I of the Indian Limitation Act." Their Lordships further observed that an application made by the Bank decree-holder certifying certain payments made to it "is no more than a request that the court will carry out the provisions of the rule and record the payments . . . and the mere fact that the document was called an 'application' and was in the form of a petition cannot . . . alter the real nature of the procedure and convert what was really no more than a certificate of certain payments into an 'application' within the meaning of article 181."

It is contended on behalf of the respondent that this case related to an application under article 181 of the Limitation Act and that their Lordships expressly refrained from expressing any opinion on the view

(1) (1910) I.L.R., 32 All., 257. (2) (1911) 8 A.L.J .. 487.
(3) (1928) I.L.R., 3 Luck., 684 (698).

taken in certain cases in India that where a decree-holder had proceeded to certify a payment which had been made out of court in satisfaction of a decree, he had taken a step in aid of execution of the decree within the meaning of article 182(5) of the Indian Limitation Act. This is, no doubt, true, but the decision of their Lordships must be regarded as conclusive on the question that the terms of order XXI, rule 2(1) involve no application and that certification under that clause is not an application under article 181. Such being the case we find it impossible to hold that a petition to the court merely to record under the same clause a payment certified by the decree-holder is an application within the meaning of article 182, sub-clause (5). The same view has been taken by a Bench of the Rangoon High Court in *Maung Tun Hlaing* v. *U Aung Gyaw* (1), by a Full Bench of the Calcutta High Court in *Amar Krishna Chaudhuri* v. *Jagat Bandhu Biswas* (2) and by a Full Bench of the Oudh Chief Court in *Ram Bharose* v. *Ramman Lal* (3). In all these cases the effect of the decision in *Shri Prakash Singh* v. *Allahabad Bank* (4) was considered and it was held that mere certification by the decree-holder of a payment of money under the decree is not an application to take some step in aid of execution of the decree within the meaning of sub-clause (5) of article 182 of the Limitation Act.

We, therefore, hold that limitation was not saved by the decree-holder's application to have the payment of Rs.12,000 recorded by the court.

On the second point it is contended on behalf of the judgment-debtor that his application requesting that the letter of the decree-holder granting him time should be placed on the record does not amount to an acknowledgment of liability within the meaning of section 19 of the Limitation Act. The learned counsel for the judgment-debtor argues that it is only giving

(1) A.I.R., 1930 Rang., 64.
(2) (1931) I.L.R., 59 Cal., 760.
(3) (1932) I.L.R., 7 Luck., 590.
(4) (1928) I.L.R., 3 Luck., 684.

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information to the court that the decree-holder has granted time to the judgment-debtor and that it does not amount to an acknowledgment of liability. We are unable to accept this contention. The application begins by a reference to the number of the case and the names of the parties, describing them as decree-holder and judgment-debtor, respectively, and then recites that "in the above case I am filing the original letter relating to extension of time written by the decree-holder, with the prayer that it may be placed on the record." It is signed by the judgment-debtor. The letter was attached to the application. It is clear from the circumstances in which the application was made that the letter referred to therein must be regarded as forming part of the application. The letter recites that it has been settled between the parties that no further execution shall be taken out in respect of the money still due under the decree before the end of 1930. The application cannot be read otherwise than as admitting the contents of the letter and filing it in court as a guarantee that the decree-holder shall observe the terms of the agreement recorded therein. It is clear to us that all the events of the 5th of September, 1929, were closely connected together and what actually took place was that, as a result of an agreement between the parties, on the judgment-debtor paying Rs.12,000 the decree-holder consented to take no further proceedings to execute his decree before the end of 1930. In the light of Explanation I to section 19 of the Limitation Act it seems to us that the application, even if considered by itself, cannot be construed otherwise than as an acknowledgment that the applicant was a judgment-debtor in a suit in which the opposite party was the decree-holder and that the decree was unsatisfied, which is a sufficient acknowledgment of liability to satisfy the requirements of section 19. When the application is read with the letter, as we hold that it must be read, a clear admission

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is added that the applicant still owes the decree-holder money under the decree and has obtained a respite from the decree-holder up to the end of 1930 for making further payment. This is a clear acknowledgment of liability.

In our opinion, therefore, the court below was right in holding that the application of the judgment-debtor of the 5th of September, 1929, started a fresh period of limitation from that date.

As we have held that the application for execution is within time in view of the judgment-debtor's acknowledgment of liability under the decree on the 5th of September, 1929, it is unnecessary for us to go into the question whether the signature of the judgment-debtor on the receipt for payment of the Rs.12,000 gave start to a fresh period of limitation within the meaning of section 20 of the Act.

The result is that the appeal fails and is dismissed with costs.

Before Mr. Justice Niamat-ullah and Mr. Justice Bennet

GUR PRASAD KAPOOR AND OTHERS (DEFENDANTS) *v.* RAMESHWAR PRASAD AND OTHERS (PLAINTIFFS)*

1933 *January*, 19

Companies Act (VII of 1913), *section* 20—*Articles of association, alteration of—Increasing the number of directors provided for by the articles—Special resolution, whether necessary.*

One of the articles of association of a company provided as follows: "Until otherwise determined by a general meeting, the number of directors shall not be less than five, nor more than nine." By a resolution passed at a general meeting of the shareholders the number of directors was increased to 16. *Held* that the alteration was valid and no special resolution was required therefor. The right construction of the article was that it was open to the shareholders to vary the number of directors therein referred to without in any way necessitating an alteration in the article itself.

*First Appeal No. 211 of 1932, from an order of Syed Iftikhar Husain, Additional District Judge of Cawnpore, dated the 7th of November, 1932.

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GUR PRASAD KAPOOR v. RAMESHWAR PRASAD

This appeal arose out of a suit for a declaration that the plaintiffs were, and that the defendants were not, directors of a certain limited company, and for other reliefs. One of the questions on which the validity of election as directors of some of the plaintiffs depended was whether in view of the articles of association the number of directors could be increased by an ordinary resolution only or whether a special resolution was necessary. Other matters, not relevant to this question, have been omitted from this report.

Messrs. *P. L. Banerji*, *M. N. Raina* and *Govind Das*, for the appellants.

Messrs. *Bhagwati Shankar*, *S. N. Seth*, *Krishna Murari Lal* and *Nanak Chand*, for the respondents.

NIAMAT-ULLAH, J. :—[That part of the judgment which is not material for the purpose of this report has been omitted.]

* * * * *

An extraordinary general meeting of the shareholders was convened on the 14th of February, 1932. One of the resolutions moved at that meeting was that the number of directors be increased to 16. The resolution was carried, and the plaintiffs 1 to 5 were elected directors for a full term of three years. It is not disputed by the plaintiffs that this resolution was not a "special resolution" within the meaning of section 81 of the Indian Companies Act. A special resolution to be valid must be confirmed at a subsequent meeting. Section 20 of the Indian Companies Act lays down that no alteration in the articles of association can be made except in pursuance of a special resolution. The learned advocate for the appellants contended that in so far as the increase in the number of directors involved an alteration of article 98 of the articles of association, it should have been sanctioned by a special resolution and that, in the absence of such a resolution, the number of directors could not be increased. Article 98 is worded as follows: "Until otherwise determined by a general meeting, the number

of directors shall not be less than five, nor more than nine." Having carefully considered the argument addressed to us on behalf of the appellants, I think that merely increasing the number of directors does not involve any alteration in article 98, which itself gives latitude to the shareholders in that respect. The words "Until otherwise determined by a general meeting" clearly imply that it was open to the shareholders to alter the number of directors mentioned in article 98. If the shareholders do alter it, their action is in pursuance of article 98 and not otherwise. If the contention put forward on behalf of the appellants be accepted, the article will have to be read as if the aforesaid words were not part of it. No clear authority was quoted in support of the view urged on one side or the other. The cases that were referred to in course of the argument are those in which the question did not directly arise and no opinion was definitely expressed. It is, therefore, unnecessary to examine them in this connection. In my opinion the right construction of the article is, as already indicated, that it is open to the shareholders to vary the number of directors therein referred to without in any way necessitating an alteration in the article itself. In the view of the case I have taken, it must be held that plaintiffs 1 and 2, who had been previously elected by the directors at their meeting of the 6th of February, 1932, and plaintiffs 3 to 5 were validly elected for the normal term at the general meeting of shareholders held on the 14th of February, 1932.

Niamat-ullah, J.

BENNET, J.:—I agree with the judgment of my learned brother and desire to add a few words on the argument of the appellants on article 98 of the articles of association. The appellants correctly pointed out that under section 20 of the Indian Companies Act any alteration or addition to the articles of association must be by a special resolution. The chief points about a special resolution are that, under section 81 of the Indian Companies Act, a special resolution must be passed by a

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majority of not less than three-fourths of the members entitled to vote at a general meeting, and the special resolution must be confirmed by a majority of the members entitled to vote at a subsequent general meeting under certain conditions of notice. The Act draws a distinction between the matters which are to be dealt with by special resolutions and the ordinary matters. The matters which are to be dealt with by special resolutions are those which relate to the constitution of the company, that is, its articles of association. The question before us is whether there was any alteration or addition to article 98 by the resolution passed at the general meeting of the 14th of February, 1932. The article states that "Until otherwise determined by a general meeting, the number of directors shall not be less than five, nor more than nine." The resolution altered the maximum from 9 to 16. The argument for the appellants is that by this alteration the article has been altered. No direct authority was shown for this proposition. There are the following reasons to consider that the raising of the maximum is not an alteration of the article:

Firstly, the increase in the number of directors is not a matter which the Act lays down in any part as requiring a special resolution. On the contrary, we find in schedule I, table A, regulation 83, the following provision: "The company may from time to time in general meetings increase or reduce the number of directors . . . ." The lower court took a peculiar view that this table A was no part of the Act; but in section 17, sub-section (2) it is stated that articles of association may adopt all or any of the regulations contained in table A in the first schedule. I consider that there is an analogy between this regulation 83 of table A and the article 98 in question. It is true that regulation 83 does not lay down the number of directors; but there is a provision in regulation 68 that the number of directors shall be determined in writing by a majority of the

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subscribers of the memorandum of association. Regulation 83, therefore, contemplates a change being made in the original number of directors, and that change to be made by a general meeting and not by a special resolution.

Another authority against the appellants is Palmer's Company Precedents, 13th edition, 1927, Part I, page 698, where there is a specimen of one of the articles of association exactly similar to article 98. This specimen says: "Until otherwise determined by a general meeting, the number of directors shall not be less than three or more than seven." This article gives the English practice, and apparently under this article the number of directors is altered by a general meeting, as a note given by Palmer states that there is only a doubt in the absence of the first seven words as to whether a special resolution is necessary. Palmer, therefore, considers that where these first seven words were present, there was no doubt that a general meeting could make the alteration required.

Lastly, in regard to the ruling quoted by the lower court, *Navnitlal Chabildas* v. *Scindia Steam Navigation Co.* (1), that ruling has been reported more fully in 29 Bom. L.R., 1362. In the Law Reporter the terms of the article in question are given, and we find that the words "unless otherwise determined by a general meeting" do not appear in the article which was the subject-matter of that case. That case, therefore, is no authority for the case before us.

For these reasons I consider that the number of directors was validly altered by the resolution of the general meeting of the 14th of February, 1932.

(1) A.I.R., 1927 Bom., 609.

REVISIONAL CRIMINAL

1933
January, 23

Before Mr. Justice Young

EMPEROR *v.* NIRANJAN SINGH AND ANOTHER*

Criminal Procedure Code, section 110—*Security for good behaviour—Same person run in a second time after release from imprisonment on the previous occasion—Evidence—Evidence in second case should relate to period subsequent to the release.*

In cases where there has been a previous proceeding under section 110 of the Criminal Procedure Code resulting in a term of imprisonment for the person proceeded against, and some time after his release fresh proceedings are taken against him under the same section, witnesses in the second proceedings ought to make it clear in their evidence that their evidence relates to the reputation of the person subsequent to his release from imprisonment. It would be intolerable that on the same evidence as before, suspected persons should continually be sent to jail under this section.

Mr. *L. M. Roy*, for the applicants.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

YOUNG, J. :—This is an application in revision from an order of the Sessions Judge of Bulandshahr against the applicants, binding them over under section 110 for one year.

This is a somewhat unusual case under the above section. Both the applicants, Niranjan and Tikam, were previously bound over in July, 1928, under this section, Niranjan for two years and Tikam for one year. Both of these applicants went to jail, as they could not find sureties. Niranjan was released in July, 1930, and Tikam in July, 1929. In March, 1932, fresh notices were served on both the applicants. Some 37 witnesses were examined for the prosecution, of whom 29 witnesses deposed to the general repute of the applicants that they were habitual thieves and house-breakers. The defence,

*Criminal Revision No. 704 of 1932, from an order of Joti Swarup, Sessions Judge of Bulandshahr, dated the 12th of September, 1932.

on the other hand, called no less than 51 witnesses, many of whom live in the same patti as the applicants. They all gave evidence that these two men were of good character and there was no suspicion against them of being habitual thieves or house-breakers. The Judge notes that 21 of the witnesses called for the defence were military men. There is no doubt that many of these defence witnesses were reputable and respectable zamindars. It is also true that they live in the same neighbourhood, and if the applicants, in fact, were habitual thieves and robbers, they would have been the first to feel the evil effects of these two men being at large.

Further, it does not appear from the judgment or the evidence whether the prosecution witnesses were deposing as to the general repute of these two applicants after they had come out of their previous incarceration. It may well be that their evidence was precisely the same as it had been upon the previous occasion when the order under section 110 was passed against these two applicants. In cases where there has been a previous order under this section, witnesses ought to make it clear in their evidence that their evidence relates to the reputation of the persons proceeded against, subsequent to their release from imprisonment. It would be intolerable that on the same evidence as before, suspected persons should continually be sent to jail under this section.

I am satisfied that this is a case which admits of doubt. I accept the revision and discharge the order of the learned Magistrate, dated the 9th of May, 1932.

APPELLATE CIVIL

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kisch

1933
January, 24

JOTI PRASAD UPADHIYA (PLAINTIFF) *v.* AMBA PRASAD (DEFENDANT)*

District Boards Act (Local Act X of 1922), section 35(3)—Question regarding due election of Chairman—Forum—Tribunal to be appointed by Local Government—Refusal of Government to appoint tribunal—Civil court—Jurisdiction impliedly barred—Civil Procedure Code, section 9—Right to vote at election of Chairman—Interpretation of statutes—Proceedings of Legislative Council.

The jurisdiction of the civil court to try a suit challenging the validity of the election of a Chairman of a District Board is impliedly barred by section 35(3) of the United Provinces District Boards Act; and even an arbitrary disregard by the Local Government of the mandatory provisions of that section, by refusing to appoint a tribunal to decide the question, does not bring into play the jurisdiction of the civil court.

The plaintiff sought redress with respect to the infringement of his right as an elected member of the Board to participate in the election of the Chairman, a right created by section 35-A of the District Boards Act. It is well settled that where the statute which creates the right also prescribes a particular remedy for the infringement of that right, that remedy, and that remedy alone, can be pursued by the person complaining of the infringement. When the Act prescribes that a dispute as to the validity of the election of a Chairman is to be decided by a tribunal appointed by the Local Government, it follows that the tribunal's jurisdiction to determine such disputes is exclusive and the jurisdiction of the civil courts is entirely barred. The legislature cannot have intended that the civil court should also have, so to say, dormant jurisdiction to decide the question and that that jurisdiction is to become active the moment the Local Government refuses to appoint a tribunal.

Where the law is clear, it is the duty of the court to give effect to it without attempting to inquire into the reasons for the enactment, and the court is not justified in appealing to

*Second appeal No. 467 of 1930, from a decree of H. G. Smith, District Judge of Agra, dated the 4th of April, 1932, reversing a decree of Manzoor Ahmad Khan, Munsif of Agra, dated the 17th of March, 1932.

the proceedings of the Legislative Council and to the alleged interpretation put upon the enactment by the Minister concerned.

Mr. *Shiva Prasad Sinha*, for the appellant.

Messrs. *S. K. Dar* and *Bhagwati Shankar*, for the respondent.

IQBAL AHMAD and KISCH, JJ. :—The question of law that arises in the present appeal is whether a civil court has jurisdiction to try a suit challenging the validity of the election of a Chairman of a District Board. Such a suit is undoubtedly a suit of a civil nature, and, unless the jurisdiction of the civil court to try such a suit is expressly or impliedly barred by any provision of law, the suit is, in view of the provisions of section 9 of the Code of Civil Procedure, triable by the civil court. It is admitted that the jurisdiction of the civil court is not expressly barred by any enactment having the force of law, but it is contended on behalf of the defendant respondent that section 35(3) of the District Boards Act (Act No. X of 1922 passed by the Local Legislature) impliedly bars the cognizance of such a suit by a civil court. If this contention is well founded, this appeal must fail and the decision of the lower appellate court dismissing the suit brought by the plaintiff appellant must stand, otherwise we shall have to decide the further question whether the lower appellate court was right in rejecting an application for amendment of the plaint filed by the plaintiff appellant in that court, in circumstances hereinafter specified.

The suit giving rise to the present appeal was for a declaration that the election of Rai Bahadur Munshi Amba Prasad, defendant respondent, as Chairman of the District Board of Agra, on the 8th of January, 1932, was "void and illegal and ineffectual", and for a permanent injunction restraining him from acting as Chairman of the Board. The facts that led to the election of the defendant are all admitted, and are as follows. [The facts which are not material for the purpose of this

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report have been omitted here.] The plaintiff's case was that the Local Government had no power to fix a date for the election of a Chairman prior to the election of the members of all the constituencies, and that as in consequence of the election of a Chairman on the 8th of January, 1932, before the election in the Iradatnagar constituency had taken place, he was deprived of his legal right to participate in the election of the Chairman, the meeting of the Board that took place on the 8th of January, 1932, was illegal and *ultra vires* and the election of the defendant as Chairman was void and illegal. The suit was filed on the 10th of February, 1932.

The defendant respondent contested the suit *inter alia* on the ground that the civil court had no jurisdiction to try the suit and that, in accordance with the provisions of section 35(3) of the District Boards Act, the question of the validity or otherwise of his election as Chairman could only be taken cognizance of by a tribunal appointed by the Local Government for the purpose of deciding that question. Section 35(3) runs as follows: "When there is a question whether the Chairman of a Board has been duly elected or nominated under subsection (2) the Local Government shall refer it for final decision to a tribunal consisting of a person or persons qualified to be appointed as Judges of the High Court who shall be appointed by the Local Government."

It appears that the plaintiff appellant has a brother named Dr. Ishwari Prasad who was elected as a member of the Board from a certain constituency on the 5th of December, 1931. He addressed a letter to the Local Government on the 19th of January, 1932, stating that the election of the defendant as Chairman was void and requesting the Government to refer the matter to a tribunal for decision. The Government despatched a reply on the 9th of February, 1932, refusing to appoint a tribunal. It is to be noted that the suit was filed the very next day, viz. on the 10th of February,

1932, and it is admitted that till the date of the institution of the suit the reply had not been received by Dr. Ishwari Prasad and that the plaintiff was not aware of the refusal of the Local Government to appoint a tribunal.

The Munsif overruled all the pleas urged in defence including the plea of jurisdiction, and passed a decree declaring that the election of the defendant respondent as Chairman of the District Board of Agra was invalid, and restrained him by a permanent injunction from acting as Chairman. In determining the question of jurisdiction raised by the defendant, he did not confine himself to a consideration of the provisions of the District Boards Act, but freely drew upon the proceedings of the United Provinces Legislative Council which culminated in the amendment of the Act in 1929 by the addition of clause (3) to section 35 quoted above, and summarized the result of his investigations as follows: "It appears to me that there are two principles underlying this enactment (District Boards Act). Firstly, that the executive should not have a final say in respect of disputes about the election of a member or a Chairman. Secondly, either for speedy determination of the dispute or to prevent the money flowing to the pockets of the lawyers, as was remarked by certain members in the Council, the matter is not to be litigated in regular courts in a regular manner." He felt impressed by the absence of any provision in the Act as regards the procedure to be followed on an election petition questioning the validity of the election of a Chairman, analogous to the provisions in the Act prescribing the procedure for the decision of an election petition questioning the validity of the election of a member of the Board. He then proceeded to quote in his judgment (from the proceedings of the Legislative Council of the United Provinces, 19th December, 1929, Vol. XLV, No. 6) what he characterized as the interpretation put on section 35(3) by the Hon'ble Minister for Local Self-Gov-

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ernment and noted that that interpretation commended itself to him. He pointed out that to uphold the defendant's contention would be to hold that "the ultimate authority lies with the executive which may refuse to appoint a tribunal and an aggrieved person like the plaintiff shall have no remedy. This would be going against a principle which . . . . underlies the laws of the District Boards." He held that "so long as a tribunal is not appointed, the jurisdiction of the civil courts in my opinion is not taken away."

The defendant respondent went in appeal to the lower appellate court. The appeal was heard and decided by the learned District Judge. An application for amendment of the plaint was presented in his court on behalf of the plaintiff, the appellant before us. By the amendment the plaintiff sought further to allege that the cause of action, apart from the dates mentioned in the plaint, also arose on the 9th of February, 1932, when the Local Government refused to appoint a tribunal in accordance with the provisions of section 35(3) of the District Boards Act.

The learned District Judge held that, as in the plaint there was no reference to the refusal by the Local Government to appoint a tribunal for the decision of the question of the validity of the election of the defendant as a Chairman and as the fact of the refusal by the Government to nominate a tribunal was not within the knowledge of the plaintiff when he filed the suit, the suit as brought was impliedly barred by section 35(3) of the Act. He did not decide the question whether, if the fact of the refusal by the Local Government to appoint a tribunal was known to the plaintiff before he filed the suit, and if that refusal was pleaded as giving to the plaintiff a cause of action for a suit in the civil court, the civil court would or would not have had jurisdiction to decide the matter. But he thought that the proposed amendment would change "the entire nature of the cause

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of action" and as the application for amendment had been made at a very late stage, he refused to grant the same. The result was that he allowed the appeal filed by the defendant and dismissed the plaintiff's suit.

In second appeal before us it is argued by the learned counsel for the plaintiff appellant that in the circumstances of the present case the learned District Judge erred in rejecting the application for amendment and that, in order finally to settle the controversy between the parties, the proposed amendment ought to have been allowed, and the District Judge should have approached the question of jurisdiction of the civil court on the assumption that the Local Government had, prior to the institution of the suit, refused to appoint a tribunal, though it was bound to do so in accordance with section 35(3) of the Act. It is pointed out by the learned counsel that to refuse the amendment prayed for would be to invite the plaintiff to institute a fresh suit on the allegations contained in the plaint with the addition of the fact that the Local Government had, on the 9th of February, 1932, refused to appoint a tribunal for deciding the question of the legality of the election of the defendant as Chairman of the Board, and this would mean waste of public time and inordinate delay in the decision of a matter which, on grounds of public policy, should be speedily settled and decided.

As we are satisfied that the jurisdiction of the civil court to try a suit challenging the validity of the election of a Chairman of a District Board is impliedly barred by section 35(3) of the District Boards Act and that even an arbitrary disregard by the Local Government of the mandatory provisions of that section, by refusing to appoint a tribunal to decide the question, does not bring into play the jurisdiction of the civil court, we refrain from expressing an opinion on the question whether the District Judge was right in refusing to allow the proposed amendment.

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The plaintiff sought redress in the present suit with respect to the infringement of his right as an elected member of the Board to participate in the election of the Chairman. This right is vested in a member by section 35-A of the District Boards Act. But for the provisions contained in the Act the right to elect a Chairman could not and did not exist in a member of the Board. It follows, therefore, that the right, the infringement of which was complained of in the present suit, owes its existence to the District Boards Act, and it is well settled that where the statute which creates the right also prescribes a particular remedy for the infringement of that right, that remedy, and that remedy alone, can be pursued by the person complaining of the infringement of the right for the redress of the alleged wrong done to him: *Abdur Rahman* v. *Abdur Rahman* (1).

The District Boards Act is a self-contained Act containing exhaustive provisions for the constitution of Boards, for the preparation of electoral rolls, for the election of members and Chairman of the Board, for the manner in which the validity of the elections of members and Chairman can be called into question, and the tribunal by which such questions are to be determined. So far as election petitions questioning the validity of the election of a member of the Board are concerned, there are detailed provisions in the Act as regards the form and presentation of such petitions and the procedure to be followed at the hearing of such petitions and it is provided by section 19 of the Act that "Except so far as may be otherwise provided by this Act or by rule, the procedure provided in the Code of Civil Procedure, 1908, in regard to suits shall, so far as it is not inconsistent with this Act or any rule, and so far as it can be made applicable, be followed in the hearing of election petitions." Then follow certain provisos which are immaterial for our present purposes. It is true, as pointed out by the Munsif, that chapter III of the Act that

(1) (1925) I.L.R., 47 All., 513.

deals with the election of a Chairman does not contain any provisions analogous to the provisions of section 19 which find a place in chapter II of the Act which is headed as "Constitution of Boards". But the mere omission by the legislature to prescribe the procedure to be followed by the tribunal appointed by the Local Government in accordance with section 35(3) of the Act does not lead to the conclusion that the legislature intended impliedly to give jurisdiction to the civil court to determine the question of the validity of the election of a Chairman in the event of the Local Government refusing to appoint a tribunal. On the other hand, the omission appears to be deliberate and suggests that the legislature, in its discretion thought fit not to trammel the tribunal by technical rules of procedure and to let the tribunal have a free hand in expeditiously deciding the question of the validity of the election of a Chairman. And the reason for it is not far to seek. Delay in the decision of the question whether a member of the Board has or has not been duly elected does not matter much. The Board, notwithstanding the pendency of such dispute, can and does go on functioning and it is provided by section 69(1) that "No vacancy in a Board, or in a committee of a Board, shall vitiate any of its acts or proceedings." But important functions of the Board have to be discharged by the Chairman and the Act clothes him with, and casts on him, powers and duties of far reaching importance, and delay in the decision of the question of the validity of his election may be disastrous and might lead to grave complications. By section 4 of the Act it is provided that the Board shall be a body corporate having perpetual succession and "vested with the capacity of suing and being sued in its corporate name, of acquiring, holding and transferring property . . . . . and of entering into contracts." The Board in most cases acts through its Chairman and it is, therefore, expedient that the controversy regarding the validity of the election of such an official of the Board should

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not remain pending for a long time and that the doubt on the point should be set at rest as speedily as possible. If jurisdiction with respect to such matters is vested in the civil courts the inevitable delay that takes place in the final decision of civil suits is bound to occur, with the result that the whole administration of the Board would be paralysed while questions of academical interest are being discussed in civil courts. It appears to us, therefore, that the legislature has reserved the question of the validity of the election or nomination of the Chairman of a Board for final decision by a tribunal appointed by it, without prescribing the procedure that the tribunal may be bound to follow.

It is unnecessary to pursue this discussion further, for if the law is clear it is our duty to give effect to it without attempting to inquire into the reasons for the enactment, and in this connection we may point out that the learned Munsif was wholly wrong in appealing to the proceedings of the Legislative Council and the so-called interpretation put upon section 35(3) by the Hon'ble Minister for Local Self-Government in order to decide the question of jurisdiction raised by the defendant. It cannot be doubted that the right of a member to vote in the election of a Chairman is the creation of the District Boards Act and that that Act prescribes that the dispute as to the validity of the election of a Chairman is to be decided by a tribunal appointed by the Local Government. It follows, therefore, that "except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive" and "It is an essential condition of those rights that they should be determined in the manner prescribed by the Act, to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary courts for they never had any; there is no change of the old order of things; a new order is brought into being.": *Bhaishankar Nanabhai* v. *Municipal*

Corporation of Bombay (1). We find it difficult to believe that the legislature, while providing that a tribunal appointed by the Local Government should be seised of the matter, intended that the civil court should also have, so to say, dormant jurisdiction to decide the question and that that jurisdiction is to become active the moment the Local Government refuses to appoint a tribunal. If the legislature wanted not to bar the jurisdiction of civil courts and not to give exclusive jurisdiction to the tribunal appointed by it, nothing would have been easier than to give expression to such an intention by express words in the enactment. The inconvenience that would result by conceding jurisdiction to the civil court can better be imagined than described. The Local Government may, for reasons that appear convincing to it, delay the appointment of the tribunal. An aggrieved member may in the meantime file a civil suit and then a tribunal is appointed by the Local Government. What is to happen in such a case? Is the civil suit to be stayed or to continue and what is to happen if the decisions of the tribunal and of the civil court are contradictory? If the civil court was to have concurrent jurisdiction with the tribunal, one would have expected provisions in the Act concerning these questions, and these matters could not have been left to be at large at common law. The omission in the Act to provide for such contingencies leads to the inevitable conclusion that the legislature did intend to bar the jurisdiction of the civil courts in such matters.

The view that we take is opposed to the view expressed in *Sarvothama Rao* v. *Chairman, Municipal Council* (2). In that case WALLACE, J., while dealing with rule 31 of the election rules under the Madras District Municipalities Act (V of 1920) which lays down that "if any question arises as to the interpretation of the rules, otherwise than in connection with an election inquiry,

(1) (1907) I.L.R., 31 Bom., 604. (2) (1923) I.L.R., 47 Mad., 585.

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the question shall be referred to the Local Government, whose decision shall be final", observed: "Now, if this tribunal had functioned in this case and given a decision, ... I am clear that the civil court would have no jurisdiction. . . . But where the proper tribunal has declined jurisdiction and the aggrieved party is thus bereft of his statutory and constitutional remedy, it is the province of the civil court, as a court of equity, to fill the vacuum created and to exercise the jurisdiction which the proper tribunal has failed to exercise." With due deference and for the reasons given above we are unable to agree with that decision. When the legislature has prescribed a particular method for the redress of an alleged wrong, that method alone is open to the aggrieved party and in such a case the civil court has no jurisdiction to deal with the matter reserved by the legislature to a specially appointed tribunal.

We hold, therefore, that the jurisdiction of the civil court to try the suit giving rise to the present appeal was impliedly barred and we accordingly dismiss this appeal with costs.

MISCELLANEOUS CIVIL

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Young

OFFICIAL LIQUIDATOR, U. P. OIL MILLS COMPANY, LIMITED (APPLICANT) *v.* JAMNA PRASAD AND OTHERS (OPPOSITE PARTIES)*.

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Hindu law—Joint family—Son's liability for father's debts—Joint family consisting of several brothers and their sons—Pious obligation of son does not arise unless family consists of father and sons only—Companies Act (VII of 1913), section 160—Contributories in case of death of member—Extent of liability of Hindu sons as such contributories—Companies Act (VII of 1913), section 30—Subscribers of memorandum are members, not merely persons who have contracted to purchase shares—Companies Act (VII of 1913), section 156—Deceased member is not a "past member".

The doctrine of pious obligation of a Hindu son to pay his father's debts would be available only when there is a family consisting of father and sons; where the family consists not only of the father and the sons, but also of brothers and nephews of the father, the position becomes entirely different. In the latter case, if the person who has incurred the debt be the manager of the family, he can bind the family only if he has incurred the debt for the benefit of the family; if he be not the manager, he cannot bind the family in any circumstances. If there is no benefit to the family, the debt can be realized by attachment, in execution, of the share of the debtor in his lifetime and sale thereof; but the share of the debtor's son would not be liable to be sold. If there be no attachment in the lifetime of the debtor, his interest would pass by survivorship to the remaining members of the family and the creditor would be without any remedy whatsoever.

Proposition No. 2 as enunciated by the Privy Council in *Brij Narain's* case, I. L. R., 46 All., 95, is confined to the case of a family consisting of a father and his sons only, and if there be more members, like brothers and nephews, of the family then the case falls under proposition No. 1.

So, where a joint family consisted of three brothers and their sons, and one of the brothers subscribed to the memorandum of

* Miscellaneous case No. 369 of 1928.

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association of a company for a certain number of shares but did not pay for them, and the official liquidator of the company in liquidation applied to have the deceased subscriber's son and nephews made contributories in his place, it was *held* (1) that as it had been found that the purchase of the shares was not for the benefit of the family, neither the nephews nor the son nor the joint family property in their hands could be made liable for the debt; and (2) that the son could be made liable only to the extent of any separate or self-acquired property of his father in his hands, and to that extent he was a contributory under section 160 of the Companies Act.

Section 30 of the Companies Act means that the subscribers of the memorandum of association of a company are to be treated as having become members of the company, by the very fact of the subscription, and not merely persons who had contracted to take shares, against whom a suit for specific performance had to be brought to make them take up the shares.

A member of a company who has died is not a "past member" within the meaning of section 156 of the Companies Act. Section 156 deals with the case of a member who has legally parted with his shares, and not one whose shares have devolved by inheritance on his death.

This case was partly heard and decided on the 31st of May, 1932. The rest of the case was heard and decided on the 3rd of February, 1933. Extracts from the first judgment, material for the purpose of elucidating the facts, are given below:

MUKERJI and YOUNG, JJ.:—This is an application on behalf of the Official Liquidator of the U. P. Oil Mills Co., Ltd., that certain persons described as the opposite parties might be brought on the record as the contributories in place of Jagmohan Ram, proprietor of Messrs. Swarath Ram Ramsaran Ram of Agra, since deceased. The facts alleged on behalf of the Official Liquidator are these. Jagmohan Ram signed the memorandum of association, on the 19th of June, 1920. Jagmohan Ram, however, did not pay anything towards the shares and he having died, the defendants, who formed a joint Hindu family with him, are liable to pay the amount of calls that may be necessary to make, for the reason that Jagmohan Ram made the purchase of shares for the benefit of the family.

Two written statements were filed, one on behalf of the son of Jagmohan, the minor Ram Lakhan, and the other by the rest

of the opposite parties. It appears and it is common ground that Swarath Ram, whose name the firm bears, had seven sons, of whom Jagmohan Ram was one. Two of the seven died without any issue. The opposite parties are the sons of the remaining five sons of Swarath Ram.

The defence of the nephews of Jagmohan Ram is that they did not admit that Jagmohan Ram ever subscribed to the memorandum of association and they denied that Jagmohan Ram ever was the head of the family or that he signed the memorandum of association on behalf of the family. The son of Jagmohan Ram denied that his father executed the memorandum of association, and raised other pleas which were similar to those raised by his cousins.

The Official Liquidator examined only one witness, Shiam Lal, and the opposite parties examined two witnesses. We have permitted the Official Liquidator to examine Shiam Lal again, because of certain alleged flaws remaining in the case; but that is no reason why the case should be adjourned, so far as the nephews of Jagmohan Ram are concerned.

The allegation of the Official Liquidator was that Jagmohan Ram purchased the shares on behalf of himself and the joint Hindu family of which he was a member. The defendants admitted that Jagmohan Ram died joint with them, and they have alleged that Jagmohan Ram left no separate property of his own. At the present moment we are not investigating the question whether Jagmohan Ram left any separate property of his own, because that question does not arise now. It being, however, an admitted fact that the nephews of Jagmohan Ram and Jagmohan Ram were joint, we have to see whether the purchase was made by Jagmohan Ram for the benefit of the family and whether the purchase binds the remaining members of the family, other than the son. The evidence adduced on behalf of the opposite parties is to the effect that Jagmohan Ram was not the eldest of the brothers. At the crucial date, namely the 19th of June, 1920, three out of the seven sons of Swarath Ram were living, namely Jagmohan Ram, Sital Prasad and Munni Lal. Munni Lal was the head of the family and carried on business at Jagdishpur in the district of Arrah where the family lived. Sital Prasad mainly carried on the business at Agra where the company was floated and he was assisted by four munims. One of the witnesses examined by the defendants admitted that Jagmohan Ram sometimes carried on the business at Agra.

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Jagmohan Ram signed the memorandum of association, if he ever signed it, as the malik (occupier) of the firm Swarath Ram Ramsaran Ram. On the evidence, therefore, it is clear that Jagmohan Ram had no better status than that of a member of a joint Hindu family. Further, we find no evidence which can show that the purchase by Jagmohan Ram was for the benefit of the family. The family did no business in shares. The business that was carried on at Agra was in sugar. The family manufactured sugar at Jagdishpur and this sugar was sold at Agra. The firm also sold sugar manufactured by others, as commission agents. There was only one customer for whom the firm at Agra purchased oil in the years 1918 to 1921. In the circumstances, it is difficult to hold that the purchase of the shares by Jagmohan Ram, assuming that he did purchase, was for the benefit of the family.

In the circumstances, we hold that the nephews of Jagmohan Ram are not liable to be brought on the record as contributories in the right of Jagmohan Ram deceased. We accordingly dismiss as against them the application of the Official Liquidator with costs.

The case of Ram Lakhan will be considered at a later stage when the additional evidence of Shiam Lal has been recorded.

After the evidence had been completed, the rest of the case was heard.

Messrs. *Bhagwati Shankar* and *Hazari Lal Kapoor*, for the applicant.

Dr. *K. N. Katju*, Dr. *N. P. Asthana*, Messrs. *Ambika Prasad* and *Shabd Saran*, for the opposite parties.

MUKERJI, A. C. J., and YOUNG, J. :—The case was partly heard and decided on the 31st of May, 1932. The result of that decision was that the application of the Official Liquidator was dismissed as against all the opposite parties, except as against Ram Lakhan, son of Jagmohan Ram. We directed by our order that Shiam Lal, witness, should be re-examined, and he has been re-examined. Now we proceed to decide the remaining issues.

Issue No. 1. The evidence of Shiam Lal now clearly establishes that Jagmohan Ram signed the memorandum

of association as a promotor and made himself liable for 151 shares of the value of Rs.100 each. Shiam Lal swore that he attested the memorandum of association in the presence of the executant, Jagmohan Ram, and * * * we hold that Shiam Lal did attest according to law the signature of Jagmohan Ram, and Jagmohan Ram's liability arose.

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Issue No. 4. According to section 160 of the Indian Companies Act Ram Lakhan is liable as a legal representative of Jagmohan Ram as a contributory "in due course of administration". This means that so far as Jagmohan Ram may have died possessed of separate property, that property in the hands of his son, Ram Lakhan, is liable as indicated in section 160 of the Indian Companies Act. It is, however, argued that not only the separate or self-acquired property of Jagmohan Ram is liable, but also the share of Ram Lakhan in the family property is liable to pay Jagmohan Ram's debt because of the pious duty of Ram Lakhan to pay such debt.

There can be no doubt that the debt in question is not tainted with immorality. Now we have to find out how far the share of Ram Lakhan in the joint family property is liable to pay Jagmohan Ram's debt.

The relevant proposition of Hindu law, when fully stated, would stand as follows :—A son is liable to pay his father's debt, out of the family property consisting of his own share and the share of the father, the property which was in the father's hand in the lifetime of the father. It is not a complete statement of the law to say that a Hindu son is bound to pay his father's debt because of a pious obligation to that effect. If that were the whole proposition of law, the son would be liable to pay out of his personal earnings, which however is not the law. The doctrine of pious obligation was invented to settle a conflict between two positions that were bound to arise in

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a family consisting of a father and his sons. The first position was that, in ancestral property, a son by his mere birth got a share which was equal to the share of the father. In accordance with this proposition of law the property in the hands of the father is *not* the absolute property of the father. That being so, he cannot utilize that property for the payment of his debts. The next position is this. A father is the head of the family. *Ostensibly*, he owns the entire property which he manages, although, *legally*, he and his sons have equal shares in the property. On the strength of this property, and on the credit of it, the father deals with the world at large and incurs debts. If the father be unable to raise any money on the credit of the joint family property, the result would probably be that in many cases maintenance of the sons and the family would become impossible; for there would be no credit in the market and nobody would lend money or provisions to the father because they would have no remedy or a poor remedy against the father. To adjust between these conflicting positions a doctrine was invented that it is the pious duty of the son to pay the father's debt, out of the entire family property, *including the shares of the sons*, provided the debt is not tainted with immorality.

The doctrine of pious obligation to pay the father's debt would be available only when there is a family consisting of father and sons. For, where the family consists not only of the father and the sons, but of brothers of the father and nephews of the father, the position becomes entirely different. Then it is no longer a case of a father at the head of his family, and incurring debts on the credit of family property. It is then a case of a debt incurred by one of the members of a Hindu family. If the person who has incurred the debt be the manager of the family, he can bind the family only if he has incurred the debt for the benefit of the family. If he be not the manager, he cannot bind the family in any circumstances. If there is no benefit to the family, the debt

can be realised, in the case of a simple money decree being passed on it, by attachment of the share of the debtor in his lifetime. If an attachment be effected, that attachment would virtually take the property attached out of the hands of the joint family and put it into the custody of the court. In that case the debtor's share, so attached, may be sold. But the share of the debtor's son would not be liable to be sold. It is the property which a father himself may sell to pay his own debt that can be sold through the intervention of the court. Where the debtor is not himself the head of a family consisting of himself and his son, he cannot sell any portion of the family property, *even his own share*, to pay his own debt: See *Balgobind Das* v. *Narain Lal* (1). If there be no attachment in the lifetime of the debtor, his interest would pass by survivorship to the remaining members of the family and the creditor would be without any remedy whatsoever: See *Binda Prasad* v. *Raj Ballabh* (2).

This state of the law has been recently laid down by their Lordships of the Privy Council in the case of *Brij Narain* v. *Mangal Prasad* (3). The case that was actually before their Lordships of the Privy Council was a case of a mortgage. But the Full Board of seven Judges proceeded to lay down the entire proposition of Hindu law on the question of payment of debts, because a previous decision of their Lordships, in *Sahu Ram Chandra* v. *Bhup Singh* (4), had to some extent unsettled the law as it was previously understood. In one sense, therefore, the propositions laid down by their Lordships were mostly *obiter dicta*, but in view of the fact that their Lordships did mean to settle the entire law we must accept their pronouncement as conclusive for us.

At page 104 their Lordships considered the several aspects that could arise in a Hindu family. The first case that their Lordships considered was the case of a joint

(1) (1893) I.L.R., 15 All., 339.
(2) (1925) I.L.R., 48 All., 245.
(3) (1923) I.L.R., 46 All., 95.
(4) (1917) I.L.R., 39 All., 437.

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family which was managed by one of the members. The law that was laid down was that the managing coparcener could neither alienate the family property nor burden the estate in his capacity as a manager except for purposes of necessity. It is important to note that their Lordships laid down the extent of the capacity of a member *as the manager*. The reason was that in other circumstances the member's acts had no effect.

In the second proposition their Lordships lay down that where the manager is a father and the family consists of a father and sons, the father has greater powers, and so long as the debt incurred by the father is not immoral, the whole estate of the family (consisting of the father and the sons) is liable to be taken in execution proceedings upon a decree for payment of that debt.

Their Lordships then state two other propositions of law with which we are not concerned here, and then they state as a fifth proposition that the liability of the estate in the case of facts stated in case No. 2 was not affected by the question whether the father was dead or alive.

Now in the case before us we have a family which does not consist merely of a father and a son or sons, but which consists of several members who do not stand in relation to one another as father and sons. The family of Jagmohan Ram consisted of himself, his brothers and his nephews and his own son. In such a case, the debt incurred by the manager could be enforced against the other members of the family only in the case of there existing a family necessity for incurring the debt. In any other case, like the present one, there is no liability at all on the family. The case before us does not fall under proposition No. 2 as enunciated in *Brij Narain's* case, because it was not the case of a family consisting of a father and sons, but it was a case in which there were members of the family other than sons.

The case before us not being covered by proposition No. 2 of their Lordships', and being covered by proposition No. 1, the liability of Ram Lakhan will be only to-

the extent of the separate or self-acquired property (which did not merge in the joint family estate) in the hands of Ram Lakhan. We accordingly decide that the liability of Ram Lakhan is only to the extent of the property to which section 160 of the Indian Companies Act applies, namely the separate property of Jagmohan Ram in which no other person had any interest in the lifetime of Jagmohan Ram.

* * * * *

Issue No. 10. It was argued on behalf of Ram Lakhan that Jagmohan Ram having died in the year 1921, he ceased to be a member of the company and therefore became a past member of the company within the meaning of section 156 of the Indian Companies Act and therefore his estate is not liable. This argument is not sound. Jagmohan Ram by his death did not become a past member within the meaning of section 156(1)(*i*). Having died, he could not continue to be a member of the company, but his estate continued to be liable. No authority has been produced before us to show that by mere death a member of a company becomes a "past member" within the meaning of section 156 of the Indian Companies Act. Section 156 deals with the case of a member who has legally parted with his shares. We accordingly hold that Jagmohan Ram's son is liable to be placed on the list of contributories.

Issue No. 11. The learned counsel for Ram Lakhan argued that because Jagmohan Ram did not pay anything towards the shares subscribed by him there was only a liability to be enforced by a suit for specific performance of the contract, to make him take up shares in the company. The argument is based on section 30 of the Indian Companies Act which says that the subscribers of the memorandum of a company "shall be deemed to have agreed to become members of the company". This section has been interpreted in several cases in this Court and other courts and it has been held that the

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words "shall be deemed to have agreed to become members of the company" mean that the subscribers of the memorandum of a company are to be treated as having become members of the company by the fact of the subscription. This view was taken in *In the matter of the Union Bank, Allahabad* (1) and in the case of *In the matter of J. H. Chandler & Co.* (2). No decided case in conflict with these authorities has been produced before us and we hold that by merely subscribing to the memorandum of association Jagmohan Ram became a member of the company.

* * * * *

The result is that we allow the application of the Official Liquidator to this extent that we direct Ram Lakhan to be placed on the list of contributories for 151 shares and that he be liable "in due course of administration" as the legal representative of Jagmohan Ram. The Liquidator will have his costs from Ram Lakhan personally, inasmuch as Ram Lakhan unnecessarily raised pleas against his liability to be brought on the list of contributories.

APPELLATE CRIMINAL

Before Mr. Justice Young

1933
February, 6

EMPEROR *v.* RAM BARAN SHUKLA*

Criminal Procedure Code, section 164—*Written confession—Magistrate accepting a confession already written out and signed by the person while under police control—Such confession inadmissible in evidence—"Record" a confession, meaning of.*

While an accused person was under the control of the police he wrote out a confession and signed it. He was thereafter taken before a Magistrate for recording his confession under section 164 of the Criminal Procedure Code. After the Magistrate had given him the usual warnings the accused person handed over the written confession to the Magistrate and said

* Criminal Appeal No. 906 of 1932, from an order of Rup Kishan Aga, Additional Session Judge of Aligarh, dated the 16th of September, 1932.

(1) (1925) I.L.R., 47 All., 669. (2) (1926) I.L.R., 48 All. 580.

that whatever he had to say was contained therein. The written confession was then read over to the accused and he said it was correct and that he wanted to make no alteration in it. *Held* that the confession was not recorded as required by section 164 and was inadmissible in evidence.

Section 164 of the Criminal Procedure Code must be construed strictly. The section enacts that the Magistrate must "record" a statement or confession; and "recording" means, and must mean, writing down the confession and not merely filing a written confession.

If a confession already written out when the accused is under the control of the police was once allowed to be admitted in evidence, the door would be opened wide to the grossest forms of abuse, and the safeguards against admitting confessions which were not voluntary would be destroyed to a large extent.

There is no analogy between a written statement made by the accused during the course of the trial in the presence of the court and a written confession handed in to a Magistrate in proceedings under section 164 of the Criminal Procedure Code.

Mr. *K. D. Malaviya*, for the appellant.

The Government Pleader (Mr. *Shankar Saran*). for the Crown.

YOUNG, J. :—Ram Baran Shukla was rations clerk in the District Jail of Aligarh. He was charged before the Additional Sessions Judge of Aligarh under sections 409 and 218 of the Indian Penal Code for criminal breach of trust, and for making false entries in his ledgers in order to cover up his defalcations. The learned Additional Sessions Judge found Ram Baran Shukla guilty on both charges, sentenced him under section 409 to one year's rigorous imprisonment, but did not sentence him at all under section 218. Ram Baran Shukla appeals.

The evidence against Ram Baran Shukla was in the first place a confession purporting to have been made by him and to have been recorded under section 164 of the Code of Criminal Procedure, and, secondly, evidence of a shortage of 37 maunds of *ata*, which *ata* was under his

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control, and of falsification of the accounts by him. There was also a statement by him made in the Magistrate's court that he had made alterations in the registers and that he had done this to avoid departmental action against himself and the jailor.

It is admitted that there was a shortage of 37 maunds 26 seers of *ata* during the months of September and October. It was admitted that Ram Baran Shukla was in charge of the *ata*, and it was further admitted by Ram Baran Shukla that he had falsified the accounts.

The first point taken by the appellant is that the confession made under section 164 of the Code of Criminal Procedure ought not to have been admitted against him by the learned Additional Sessions Judge. It appears that this confession was made under somewhat unusual circumstances. While Ram Baran Shukla was under the control of the police he reduced his confession into writing and signed it. Thereafter he was taken before the Magistrate to record his confession under section 164 of the Code of Criminal Procedure. The Magistrate warned Ram Baran Shukla according to the procedure laid down, and thereafter Ram Baran Shukla handed over the written document to the Magistrate, saying "Whatever I want to state in my confession is in writing before you and is marked by you as Ex. 1. I shall say nothing beyond that." The written confession was then read over to the accused and he stated: "I have heard this statement. It is correct. I do not want to make any alteration in it. It is in my handwriting and the signatures on it are mine." Section 164 enacts as follows: "Any Presidency Magistrate, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf by the Local Government may, if he is not a police officer, record any statement or confession made to him in the course of an investigation under this chapter or at any time afterwards before the commencement of the inquiry or trial." The learned Additional Sessions Judge admitted this confession against the prisoner on the

analogy of a written statement tendered by an accused person to the court during the hearing of the trial. Such a written statement would be admissible. The learned Additional Sessions Judge goes on to say: "The mere fact, therefore, that such delivery took place at a time when the Magistrate was under the impression that the accused would make a verbal statement to him, but the accused instead of making a verbal statement delivered the document in question to the Magistrate. would not make the proof of such document inadmissible because under a mistaken notion that the accused was going to make a verbal statement the Magistrate may have first gone through the procedure which is laid down by section 164 for recording such statement." In my opinion, the learned Additional Sessions Judge has completely misdirected himself in law. There is no analogy between a written statement made during the course of the trial in the presence of the court and a written confession handed in to a Magistrate in proceedings under section 164. The learned Judge could not have noticed the last part of section 164, which only allows confessions to be recorded "in the course of an investigation under this Chapter or at any time afterwards *before* the commencement of the inquiry or trial". It is further to be noted that the learned Magistrate who received this confession must have known that he was proceeding illegally, for he records, as is usual, at the end of the confession in his own handwriting that "it was *written* by me and read over to the person making it, and it was admitted by him to be correct". It is perfectly clear that this confession was not written by the learned Magistrate.

Section 164 must be construed strictly. The section enacts that the Magistrate must "*record*" any statement or confession. It is playing with words to suggest that the procedure in this case amounted to "recording" a confession. "Recording", in my opinion, means, and must mean, writing down the confession. It does not

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mean merely filing it. Further, it is to be noted that one of the essential rules is that the Magistrate should draw the attention of the confessing accused to the fact that there are no police present while the confession is being recorded, the reason being that there may be less risk that the confession is made under the influence of the police. If the confession is written down when the accused is under the control of the police and then handed to the Magistrate the reason for insisting upon this precaution is destroyed. The law enacts that a confession should be recorded by a Magistrate himself. When an accused is making an oral confession it is much easier for the Magistrate who records it to make up his mind whether that confession is voluntary or not.

It is of the utmost importance that the strict rules laid down by the Criminal Procedure Code and the High Court for the recording of such confessions should be strictly followed in every respect. For a criminal to confess his guilt is an unnatural proceeding. It is possible that remorse may produce a confession in a very small number of cases, but material advantage or fear is at the root of most confessions. Either the accused thinks that he will obtain some benefit from making a confession, by being made an approver or getting a lesser sentence; or he may even be induced or compelled to make such a confession. Self-interest or fear are not sound foundations for a true confession; this the Code of Criminal Procedure, the Evidence Act and the courts recognize, and therefore the greatest care is insisted on in the recording of such confessions. If a confession already written out when the accused is under the control of the police was once allowed to be admitted as evidence, the door would be opened wide to the grossest forms of abuse. The difficulties that courts now have with regard to confessions would be very largely increased. If interested parties were inclined to bring pressure to bear on an accused, or to induce him to make a confession, it would be a simple matter for false statements to

be introduced into a written confession. There would then be no necessity even for "tutoring".

I have not been referred to any authority on this point. But it appears to me that it cannot be too clearly laid down that such a confession is inadmissible as evidence.

Omitting, therefore, the confession as evidence against the accused, it has to be seen if there is sufficient evidence on the record to justify a conviction. In my opinion, there is. When a public servant is in charge of goods and it has been proved or admitted that there is a large shortage in those goods, and it is also proved or admitted that the accused, in order to hide the loss, has falsified the books, it seems to me that there is only one inference possible, that of guilt. In a case like this the onus would be on the accused,—the facts being admitted or proved—to give some reasonable explanation for the facts. Such an onus, in my opinion, is almost impossible to discharge. It is further contended for the appellant that where there may be another inference equally possible, a conviction would not be justified. The accused himself says in his statement that he did this, knowing that there was a shortage, in order to avoid departmental action. Counsel contends that a possible inference to be drawn is that the accused being negligent with regard to the goods under his control, merely falsified the accounts in order to escape departmental punishment. Apart from the fact that this is an admission of guilt under section 218 of the Indian Penal Code, I do not think that such an inference can possibly be drawn in this case. 37 maunds 26 seers of *ata* cannot disappear through mere negligence. The accused blames the kitchen warders for making these defalcations. In my opinion, it is impossible for any one to have made these defalcations without the accused knowing all about them. There is therefore sufficient evidence on the facts proved, apart from the confession, in this case to justify conviction.

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An appeal has also been made to me to reduce the sentence of one year's rigorous imprisonment. I cannot see my way to alter the sentence, though it is perfectly true that a good many other people in the jail as well as the accused must have been implicated in this fraud. The result is that both the conviction and sentence are upheld and the appeal is dismissed.

FULL BENCH

Before Sir Lal Gopal Mukerji, Acting Chief Justice, Mr. Justice King and Mr. Justice Niamat-ullah

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BAHADUR LAL (APPLICANT) *v.* JUDGES OF THE HIGH COURT AT ALLAHABAD (OPPOSITE PARTIES)*

Civil Procedure Code, order XLV, rule 7—Limitation and Civil Procedure (Amendment) Act (XXVI of 1920), section 3—Privy Council Rules, 1920, Rule 9—Appeal to Privy Council —Deposit of translation etc. charges—Power to extend time beyond the statutory period for such deposit—Interpretation of statutes.

Held (NIAMAT-ULLAH, J., dissenting) that rule 9 of the Privy Council Rules, 1920, does not empower the Court to extend, beyond the limit fixed by order XLV, rule 7 of the Civil Procedure Code, the time for furnishing the security and depositing the translation etc. charges required by that rule in connection with an appeal to the Privy Council.

Per KING, J.—Even if an order allowing more time was intended to be included among the orders to be passed under rule 9 of the Privy Council Rules, 1920, it must be taken that it was intended that time could be allowed only in accordance with order XLV, rule 7. According to the maxim "*generalia specialibus non derogant*" the provisions of rule 9 of the Privy Council Rules could not, in the matter of allowing time, be deemed to override the provisions of order XLV, rule 7.

Mr. *A. Sanyal*, for the applicant.

Mr. *Muhammad Ismail* (Government Advocate), for the opposite parties.

*Application No. 27 of 1932, for leave to appeal to His Majesty in Council.

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KING, J. :—This reference arises out of an application for leave to appeal to His Majesty in Council. The applicant, Lala Bahadur Lal, is an advocate practising at Benares. On the 26th of May, 1932, a Bench of this Court passed an order suspending the applicant from practice for a term of three months. The applicant applied for leave to appeal to His Majesty in Council and on the 10th of June, 1932, a certificate was granted that the case was a fit one for appeal to His Majesty in Council. Under order XLV, rule 7, the applicant was bound to furnish security, and to deposit the amount required for translation and printing within six weeks from the date of the grant of the certificate, or within 90 days from the date of the order complained of, or within such further period not exceeding 60 days as the court might upon cause shown allow. The term of six weeks from the grant of the certificate expired on the 22nd of July, 1932, and no application was made for any extension of that term. By an order dated the 27th of July, 1932, a Bench of this Court passed an order extending the time for furnishing security to 150 days from the date of the order to be appealed against. This period expired on the 24th of October, 1932.

On the 24th of October, 1932, the applicant filed a petition stating that he had been ordered to furnish cash security to the amount of Rs.4,000 and had got the money ready. He stated that if he deposited the money in court he would lose interest and therefore he asked permission to purchase postal cash certificates to the value of Rs.4,000 and to deposit the certificates in lieu of cash. The learned Judge before whom the application was presented passed an order that the tender might be accepted and that the office should submit a report. The office submitted a report on the 26th of October, 1932, stating that as the security of Rs.4,000 and the costs of translation and printing had not yet

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been deposited and the period for deposit had expired, no deposit could be received. The learned application Judge then passed an order on the 27th of October that the post office cash certificates might be received instead of cash and that the sum of Rs.393-13-0 for translation and printing charges might be accepted if deposited in cash on that day. The applicant accordingly deposited the post office cash certificates and the sum of Rs.393-13-0 on the 27th of October.

The first question is whether the security has been furnished and the cash deposited within time.

The answer depends upon whether the applicant made a valid tender of the amount which he was required to deposit on the 24th of October, 1932. This is mainly a question of pure fact. On the date in question he did not actually deposit any cash or post office cash certificates but he stated that he had the money for the security of Rs.4,000 ready and asked permission to deposit that amount in the form of post office cash certificates instead of in cash. As his tender was accepted, it may be held to be a valid tender of Rs.4,000 as security within time. The applicant, however, did not even refer to the sum of Rs.393-13-0 which also had to be deposited in cash on the 24th of October. There was no question of depositing this sum in the form of post office cash certificates. He did not deposit this sum in cash on the 24th of October, and did not even state that he had the cash ready and was willing to deposit it on that date. Under order XLV, rule 7, the applicant was bound not merely to furnish security for the respondents' costs but also to deposit the translation and printing charges. As he did not deposit, or offer to deposit, the translation and printing charges on the 24th of October, I think it is clear that his tender was not valid and that he cannot be held to have complied with the requirements of order XLV, rule 7 within time.

The next question is whether this Court is empowered under order XLV, rule 7, to extend time for furnishing security and for depositing translation and printing charges beyond the term of 150 days from the order to be appealed against. If the language of order XLV, rule 7 is to be construed without reference to the rules made by His Majesty in Council, I think it is clear that the Court has no power to grant any further extension. As order XLV, rule 7 now stands (after the amendment introduced by Act XXVI of 1920), the applicant is bound to furnish the security and make the deposit "within 90 days or such further period, not exceeding 60 days, as the court may upon cause shown allow, from the date of the decree complained of". Considering that the legislature has expressly laid down that the Court can grant a further period not exceeding 60 days, it seems to me clear that the court has no discretion to grant any extension beyond 60 days. This view has almost uniformly been accepted by the High Courts in India. So far as this Court is concerned I would refer to the decision in *Ram Dhan* v. *Prag Narain* (1), which was followed in *Joti Prasad* v. *Harkesh Singh* (2). To my mind it is perfectly clear that under the provisions of order XLV, rule 7, the High Court has no discretion to grant extension of time exceeding 150 days from the date of the decree or order to be appealed against.

The last question is whether the provisions of order XLV, rule 7, in so far as they limit the discretion of the court to grant an extension exceeding 150 days from the date of the decree, have been overridden by a rule contained in an order of His Majesty in Council. The order referred to was made on the 9th of February, 1920, and was published for information in the Gazette on the 17th of April, 1920, and was declared to come into operation on the 1st of January, 1921. This order

(1) (1921) I.L.R., 44 All., 216. (2) (1928) 26 A.L.J., 433.

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contained certain rules for regulating the practice in appeals to His Majesty in Council, and we are concerned with rule No. 8 which runs as follows: "Where an appellant, having obtained a certificate for the admission of an appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the court for an order admitting the appeal), the court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and may give such directions as to the costs of the appeal and the security entered into by the appellant as the court shall think fit, or make such further or other order in the premises as, in the opinion of the court, the justice of the case requires."

It is argued for the applicant that under this rule the High Court is given unlimited discretion to extend time for furnishing the security and making the necessary deposit, notwithstanding anything contained in order XLV, rule 7. The language of rule No. 9 is certainly very wide. It does not expressly state that the court may extend time if the appellant fails to furnish security and to make the deposit, but it empowers the court in case of such failure "to make such further or other order in the premises as, in the opinion of the court, the justice of the case requires". The main question is whether this wide and general power conferred by rule 9 should be interpreted as conflicting with a clear statutory provision which regulates the same subject. If the provisions of order XLV, rule 7 are interpreted as irreconcilable with the provisions of rule 9 which was made by His Majesty in Council, then I think it is clear that, under section 112 of the Code of Civil Procedure, the latter rule must prevail. In my opinion, however, there is no real conflict between these two rules. It is a well recognized maxim of interpretation that when there are two provisions

having the force of law and regulating the same subject, they should if possible be so construed as to be consistent with each other. The Indian legislature in passing Act XXVI of 1920 obviously must have borne in mind the provisions of the order of His Majesty in Council dated the 9th of February, 1920. That order came into force on the 1st day of January, 1921, and Act XXVI of 1920 also came into force on the very same day. Obviously the Indian legislature could not have intended and provisions of Act XXVI of 1920 to conflict with any rule made by His Majesty in Council, and we should be very reluctant to hold that any provision of Act XXVI was invalid as being inconsistent with the Privy Council rule. The Privy Council rules, and Act XXVI, must be taken to be parts of the same legislative scheme and construed accordingly. I think it is possible to construe rule 9 so as to avoid any inconsistency. That rule gives the court discretion to pass certain orders in case of default made by the appellant in furnishing security and making the deposit. The orders are to be passed when the appellant "fails to furnish the security or make the deposit required". I think this contemplates the stage when there has been a *final* failure, i.e. when the appellant has failed to do the necessary acts before the expiration of the final statutory period, together with such further period (if any) as the court may have granted according to law. In other words, I think the stage at which rule 9 becomes applicable is not reached until the expiration of both statutory periods and until the court either cannot or will not grant any further period. If this is the correct interpretation, it seems to me that rule 9 does not even contemplate the allowance of any further period. It only contemplates the passing of such *other* orders as may be necessary in consequence of the appellant's final failure to do the necessary acts within the statutory period together with such

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further period (if any) as the court has allowed according to law.

If rule 9 is held to be applicable as soon as the appellant fails to do the necessary acts within the *statutory* period, then the court may in some cases (as in the present case) be empowered under order XLV, rule 7, to allow a further period, and it is unnecessary to invoke rule 9 as authorizing such allowance.

In my opinion, therefore, rule 9 was never intended to sanction the allowance of any further period. It refers to such other orders as may be necessary when there has been a final failure and when no question arises of granting more time.

It must, however, be conceded that the powers given by rule 9, to "make such further or other order . . . as, in the opinion of the court, the justice of the case requires", are wide enough to cover an order granting a further period. The question then arises whether the legislature intended by such general words to give the courts absolute discretion to ignore or override a clear statutory provision in the matter of granting a further period. Supposing the court has (as in this case) already allowed the maximum further period permitted by law. Has the court discretion under rule 9 to allow a further *unlawful* period? I think not. When a court is given discretion to do something, it must be understood that a *judicial* discretion is given, to be exercised according to law, not an absolute discretion which may be exercised in defiance of law. It seems hardly necessary to quote authority for this proposition. The Indian legislature has by statute limited the discretion of the court in the matter of allowing time. I doubt whether rule 9 even contemplated an order allowing more time. But even if such an order was intended to be included among the orders to be passed under that rule, then I think it was intended that time could be

allowed only in accordance with law. Statutory provisions cannot, in my opinion, be overridden without clear words to that effect. The meaning of the wide and general language empowering the court to make such further order as the justice of the case requires should, I think, be restricted so as to authorize only a lawful order, and not an unlawful order. On this view the suggested conflict between rule 9 and order XLV, rule 7 can be reconciled.

An alternative justifiable method of reconciling the two provisions is to apply the maxim "*generalia specialibus non derogant*". If Privy Council rule 9 gives power to enlarge time it is only because its language is so general and sweeping that it would include orders of every description. The limitation of the court's discretion to enlarge time (introduced by Act XXVI of 1920 into order XLV, rule 7) is, on the other hand, a very special provision. Now the relevant rule of interpretation is stated in Maxwell's Interpretation of Statutes (7th edition, page 146) as follows: "Where a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention is considered an exception to the general one." Cases are cited in which inconsistent Acts, or inconsistent provisions of the same Act, have been treated as reconcilable in this manner. Adopting this method we may treat the special provision enacted by Act XXVI of 1920, not as repealed by the sweeping terms of Privy Council rule 9, but as being an exception to the latter. In view of the fact that the Privy Council rules were expressly made for the purpose of "preventing delays" in the making of appeals, I think it would be unreasonable to interpret rule 9 as defeating an attempt on the part of the Indian ligislature to prevent delays by limiting the discretion of the courts in allowing time for furnishing security and making deposits.

It seems to me that a similar method of interpretation is required to avoid a conflict between order XLV, rule 7, and section 148 of the Code of Civil Procedure.

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When the statutory period of 90 days fixed by order XLV, rule 7 has expired, no extension of that period is given by statute. If any extension is given, it is given by the court "upon cause shown". Supposing the court extends the time by 50 days and the appellant subsequently applied for a further extension of 20 days. Under section 148 the court could grant the application, being expressly permitted to enlarge the period, from time to time, "in its discretion". No limits are fixed to the number or length of the enlargements. Now, if we turn to order XLV, rule 7, we find that the court could not grant a further extension exceeding 10 days. Clearly there is a conflict between the two provisions. Which of them is to prevail? I think it is clear that order XLV, rule 7 must prevail, both on the principle "*generalia specialibus non derogant*" and on the principle that the general discretion given by section 148 is a judicial discretion which can only be exercised according to law and not in contravention of law.

The applicant relies strongly upon the Full Bench decision of the Bombay High Court in *Nilkanth Balwant* v. *Satchidanand Vidya Narsinha* (1). In that case it was held by the Full Bench that rule 9 of the Privy Council rules of 1920 empowers the court to enlarge the time for furnishing security and making the deposit beyond the period prescribed by order XLV, rule 7. This view has been expressly dissented from by the Madras High Court in *Poornananthachi* v. *Gopalaswami Odayar* (2). The whole question and the conflicting authorities have been fully discussed in that ruling and I need only say that I agree to the view taken by the learned Judges in that case and respectfully dissent from the view expressed by the Bombay High Court. In an unreported decision of this Court, *Hansnath* v. *Raghu Prasad Singh* (3) a Bench of this Court also took the view that rule 9 of the Privy Council rules does not override the provisions

(1) (1927) I.L.R., 51 Bom., 430. (2) (1932) I.L.R., 55 Mad., 835.
(3) P.C.A., No. 25 of 1927, decided on the 21st of October, 1927.

of order XLV, rule 7. The view taken by the Bombay High Court was expressly dissented from.

In my opinion, the view taken in this unreported case by a Bench of this Court, and the view taken by the Madras High Court, is correct and I would hold that the court has no discretion to extend time exceeding 150 days from the date of the order to be appealed against.

MUKERJI, A. C. J. :—I am entirely of the same opinion as my brother, KING, J. I may add that I took the same view in the unreported case referred to by my brother. In that case, the effect of clause 9 of the Privy Council rules is not discussed at length. But I have had the advantage of fuller arguments on the point and also the advantage of reading the judgments of the Bombay and Madras Courts. I am of opinion that the Privy Council rule was never framed with the idea of extending time beyond the limit fixed by the Indian legislature; and the two sets of rules, one contained in order XLV of the Code of Civil Procedure and the other contained in the Privy Council rules, were meant only to supplement one another. The legislature knew that if they framed any rules, by amending order XLV, they could not override the rules framed by His Majesty in Council, and they had the rules framed by His Majesty in Council before them when they amended order XLV. Then as the two sets of rules came into force on one and the same day, it may be fairly assumed that the draft Bill of the Indian legislature was submitted to His Majesty in Council for approval. It is open to us to read the rules of both the authorities so as to harmonise them, and we ought to read them as harmonising. I would therefore revoke the certificate already granted to Lala Bahadur Lal, on the ground that he has failed to deposit the translation and printing charges within the time allowed by rule 7 of order XLV of the Code of Civil Procedure.

NIAMAT-ULLAH, J. :—I am in agreement with my brother, KING, J., on questions of fact arising in this case. The applicant, Babu Bahadur Lal, was suspended for three months by a Bench of this Court

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on the 26th of May, 1932. The period of limitation for an application for leave to appeal to Privy Council is 90 days; but as the applicant had to obtain an order of stay in respect of the suspension order passed against him, he had to apply for leave to appeal much earlier than is usual. Leave was granted on the 10th of June, 1932, and under order XLV, rule 7, of the Code of Civil Procedure, he had to furnish security for costs of the respondent and to deposit the amount required to defray the expenses of translating, etc., within 90 days or such further time not exceeding 60 days as the Court may allow, from the date of the order appealed from (in this case 26th of May, 1932) or within six weeks from the day of the grant of the certificate (in this case 10th of June, 1932). The applicant was allowed the maximum period of 60 days by which the period of 90 days counted from the date of the order appealed from could be extended. I agree in holding that, in the circumstances of the case, the applicant should be considered to have made a valid tender of security within time but that he failed to deposit the sum of Rs.393-13-0 required for expenses of translating, transcribing, etc. This sum should have been deposited by the 24th of October, 1932, but was not deposited till the 27th of October, 1932. The question is whether the delay of three days in depositing the estimated costs of translating, etc., required by order XLV, rule 7 (1) (*b*) of the Code of Civil Procedure, can be condoned.

A Division Bench of this Court held in *Ram Dhan* v. *Prag Narain* (1) and in *Joti Prasad* v. *Harkesh Singh* (2) that the Court had no power to extend the time provided for by order XLV, rule 7. It has since been held by a Full Bench of the Bombay High Court in *Nilkanth Balwant* v. *Satchidanand Vidya Narsinha* (3) that in view of rule 9 of the Privy Council rules

(1) (1921) I.L.R., 44 All., 216. (2) (1928) 26 A.L.J., 433
(3) (1927) I.L.R., 51 Bom., 430.

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of 1920 the Court had power to grant extension of time beyond what is laid down in order XLV, rule 7. A Division Bench of the Madras High Court has taken a contrary view in *Poornananthachi* v. *Gopalaswami Odayar* (1). The present reference to a Full Bench has been made in view of the conflicting authorities above referred to.

I may say at once that the question is not free from difficulty; but on a consideration of the language of order XLV, rules 7 to 11, and rule 9 of the Privy Council rules, I have arrived at the conclusion that the Court has power to grant further extension than what is provided for by order XLV, rule 7 of the Code of Civil Procedure.

Great stress is laid on the circumstance that the Privy Council rules and Act XXVI of 1920, by which a maximum limit of extension was introduced in order XLV, rule 7 of the Code of Civil Procedure, came into force on the same day. Though the two were enacted at different places and by different authorities, yet they may be taken to be part of the same scheme, as was held by the learned Chief Justice of the Madras High Court in *Poornananthachi* v. *Gopalaswami Odayar* (1). I am quoting below relevant portions of the various provisions, including rule 9 of the Privy Council rules, in the order in which, in my opinion, they should be read in order to understand the extent to which order XLV, rule 7 really limits the power of the Court in extending time.

Order XLV, rule 7: "Where the certificate is granted, the applicant shall, within ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow, from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

(*a*) furnish security in cash or in Government securities for the costs of the respondent, and

(1) (1932) I.L.R., 55 Mad., 835.

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(*b*) deposit the amount required to defray the expenses of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit."

Order XLV, rule 8: "Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

(*a*) declare the appeal admitted,

(*b*) give notice thereof to the respondent,

(*c*) transmit to His Majesty in Council . . . a correct copy of the said record. . .

(*d*) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor."

Rule 9 of the Privy Council rules: "Where an appellant, having obtained a certificate for the admission of an appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court for an order admitting the appeal), the Court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and may give such directions as to the costs of the appeal and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires."

Order XLV, rule 10: "Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate, or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid, the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment."

Order XLV, rule 11: "Where the appellant fails to comply with such order, the proceedings shall be stayed, and the appeal shall not proceed without an order in this behalf of His Majesty in Council, and in the meantime execution of the decree appealed from shall not be stayed."

Rule 9 of the Privy Council rules is so worded that it is impossible to construe it as excluding the power to condone delay in furnishing security or depositing

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the expenses of translation, etc., as an alternative to cancelling the certificate. The words "or make such further or other order . . . as the justice of the case requires" are comprehensive enough to include a power to condone delay or extend time as an alternative to the certificate being cancelled. There is, in my opinion, no justification for restricting the ordinary and natural meaning of the words referred to above. It is, however, clear to me that though the rule does not place any limit on the power of the Court in granting extension as an alternative to cancelling the certificate, yet the rule contemplates extension in rare and exceptional cases.

The scheme of the provisions quoted above is, to my mind, as follows: Order XLV, rule 7 is not intended to provide exhaustively what power the Court can exercise in the matter of granting time. As the rule clearly indicates, it contains an injunction addressed to the applicant, who is directed to furnish security or to make deposit within 90 days or such further period not exceeding 60 days from the date of the decree, or within six weeks of the grant of the certificate. The rule which follows (rule 8) lays down what is to happen if he does furnish the security and make the deposit. In that case his appeal "shall" be admitted and certain other things therein mentioned must follow. If the security is furnished and the deposit is made within the time referred to in rule 7, no discretion has been given to the Court, which must declare the appeal admitted and do certain other matters. The Code of Civil Procedure does not mention the consequences of the applicant's failure to furnish security or to deposit expenses. This is the province of rule 9 of the Privy Council rules, which provides that, in case the applicant fails to furnish the security or make the deposit, the Court has discretion (which it would not have had if the deposit had been made) to cancel the certificate, or if the justice

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of the case requires, to condone the delay or grant further time. In my opinion order XLV, rule 7, and rule 9 can be so read as to avoid inconsistency between them. As already stated, rule 7 does not say expressly or by necessary implication that the Court has no power to grant an extension for more than 60 days. As regards the first period therein mentioned, the period of 90 days or the extended period is laid down for the applicant who, if he is to retain the absolute right of having his appeal admitted, must furnish security and make the deposit within that time.

Assuming that rule 7 does limit the power of the Court in granting extension, that limit operates for a given purpose. The Court may not extend the period of 90 days from the date of the decree by more than 60 days for the purpose of enabling the applicant to have an absolute right of the appeal being admitted and of excluding its own discretion in cancelling the certificate or condoning delay. Once the stage when rule 9 can be applied is reached, the applicant loses that absolute right and runs the risk of the Court's discretion being exercised against him. According to the rule or order XLV, rule 7 the Court is not compelled to cancel the certificate on the applicant failing to furnish security or make the deposit. It may be that, on security being furnished and the deposit made, the Court must admit the appeal; but the converse does not necessarily follow that if the security is not furnished or the deposit is not made the Court must cancel the certificate. The rule is clear that in such a contingency the Court is not bound to cancel the certificate, and may pass any order which the justice of the case may require. I cannot imagine that the law in this respect has been deliberately made so stringent as to give no power to the Court in condoning delay where the deposit within time, for costs of translating and printing, was, through inadvertence,

short by a trifling amount which, however, was deposited beyond time, or where the applicant furnished security one day after the last date in circumstances beyond human control. It is, to my mind, impossible to accept the hypothesis that the legislature had deliberately excluded the power of the Court to condone delay in extreme cases of the kind referred to above. Rules 10 and 11 of order XLV indirectly throw some light on the intention of the legislature as to what should happen in case security for costs is not furnished or deposit is not made within the time limited by rule 7. It is significant that the consequences of the appellant's failure to furnish additional security or to make the additional deposit for costs of translating and printing are expressly stated in rule 11. In that case the appeal "shall not proceed without an order in this behalf of His Majesty in Council." If it was the intention of the legislature that the period provided by rule 7 should be taken to be so rigid that the applicant's failure to furnish security or to make the deposit within the period referred to in rule 7 should have the consequences of the certificate being cancelled, the Code of Civil Procedure should have provided that the certificate shall be cancelled or that, like rule 11, the proceedings shall not proceed without an order in this behalf of His Majesty in Council. On the contrary, we find that rule 9 expressly provides that in such an eventuality the Court is not bound to cancel the certificate but may pass any other order, including, of course, the order condoning delay or extending time if the justice of the case may so require.

I may refer, by way of analogy, to what has been held by several High Courts in reference to order IX, rule 9 of the Code of Civil Procedure, which provides that where a suit is dismissed in default of plaintiff's appearance the court "shall make an order setting aside the dismissal" if the plaintiff satisfies the court

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that there was sufficient cause for non-appearance when the suit was called on for hearing. A Division Bench of this Court in *Lalta Prasad* v. *Ram Karan* (1) held that "Order IX, rule 9 makes it compulsory on a court to set aside a dismissal under order IX, rule 8 where the plaintiff satisfies the court that there was sufficient cause for non-appearance. It, however, cannot take away the court's power to restore the case for any other valid reason." The Bombay High Court has taken the same view in *Bilasirai* v. *Cursondas* (2). To my mind the same reasoning is applicable in the present case. If the applicant furnishes security and makes the deposit within the time laid down by rule 7 of order XLV, it is compulsory on the Court to admit his appeal. If, however, he fails to do so, the power of the Court given by rule 9 of the Privy Council rules may yet be exercised in his favour, if the ends of justice so require. It should be noticed that, in cases in which sufficient cause for non-appearance was not shown and, therefore, the court was not bound to restore under order IX, rule 9, it had to resort to its inherent power. Other High Courts held that there was no inherent power where express provision was made; *Neelaveni* v. *Narayana Reddi* (3). A case of the kind before us is free from this complication, as it is not necessary to have recourse to inherent power but to powers expressly given to it by rule 9.

As regards the case law, the only cases in which rule 9 has been considered are *Nilkanth Balwant* v. *Satchidanand Vidya Narsinha* (4), *Poornananthachi* v. *Gopalaswami Odayar* (5) and *Hukum Chand Kasliwal* v. *Radha Kissen Moti Lal Chamaria* (6). All other cases, including those decided by this Court, are cases in which rule 9 of the Privy Council rules was overlooked. They are, therefore, no authority for the

(1) (1912) I.L.R., 34 All., 426.
(2) (1919) 21 Bom., L.R., 952.
(3) (1919) I.L.R., 43 Mad., 94.
(4) (1927) I.L.R., 51 Bom., 430.
(5) (1932) I.L.R., 55 Mad., 835.
(6) A.I.R., 1932 Oudh, 249.

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determination of the question which we are called upon to decide. The decision of the Full Bench in *Nilkanth Balwant* v. *Satchidanand Vidya Narsinha* (1) is in favour of the view which I am inclined to take, though I do not think with the learned Judges who decided that case that there is necessarily an inconsistency between order XLV, rule 7 of the Code of Civil Procedure and rule 9 of the Privy Council rules. The learned Judges in that case held that if there is an inconsistency, rule 9 of the Privy Council rules should prevail. I would accept this view if the two be taken to be irreconcilable.

Poornananthachi v. *Gopalaswami Odayar* (2) is a definite pronouncement against the view that the Court has power to extend time beyond that which is prescribed by order XLV, rule 7. BEASLEY, C. J., who delivered the leading judgment in the case, conceded that rule 9 does confer power on the Court to extend time, but he expressed the opinion that the extension must be within the limits laid down by order XLV, rule 7 of the Code of Civil Procedure. He observed as follows: "I do not think rule 9 of the Privy Council rules is in conflict with order XLV, rule 7, because the latter rule does provide for a further extended period not exceeding 60 days upon cause being shown to the Court. Suppose, therefore, the 90 days from the date of the decree have passed without security being furnished; rule 9 of the Privy Council rules, it seems to me, gives nothing more than the right to cancel the certificate or, if it can be read as giving the Court any power to extend the time, then, if good cause is shown, to extend the time for furnishing the security, provided the extended time does not exceed 60 days." With respect, I wish to point out that the application of rule 9 is not necessarily reached when the 90 days from the date of the decree have passed and the applicant has failed to furnish security and make the deposit required by rule 7. It should be borne in mind that the period of limitation

(1) (1927) I.L.R., 51 Bom., 430. (2) (1932) I.L.R., 55 Mad., 835.

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for an application for leave to appeal to the Privy Council is 90 days from the date of the decree to be appealed from. In a large majority of cases the period of six weeks from the date of the certificate expires long after the 90 days from the date of the decree and also the maximum period of 60 days by which the Court may extend the aforesaid 90 days. It is, therefore, not correct to say that rule 9 becomes applicable when the 90 days from the date of decree have expired and unless the Court grants an extension up to the period of 60 days it should cancel the certificate, because, in a majority of cases, the six weeks from the date of the certificate is yet to run, and the Court has no discretion to cancel the certificate in terms of rule 9. It seems to me clear that a case for cancellation of certificates cannot arise, except when not only the 90 days from the date of the decree but also six weeks from the date of the certificate have expired. If, therefore, six weeks from the date of the certificate expired long after the expiry of 90 days *plus* 60 days (by which that period could be extended), and the Court has to take action under rule 9 of the Privy Council rules, its powers are, as the rule stands, to cancel the certificate or make such other order as the justice of the case requires, including the power to condone delay for cogent reasons. If the same words imply the power to extend time when it is reached after the expiry of the 90 days from the date of the decree, I fail to understand why the meaning of the same words should be different when it is reached after the expiry of six weeks from the date of the certificate. I do not think clear meaning of words employed in any rule of law can be controlled by conclusions as to the intention of the legislature drawn from speculative theories.

As regards the Oudh ruling, to which reference has already been made, it is enough to point out that it does not discuss the question and dissents from

Nilkanth Balwant v. *Satchidanand Vidya Narsinha* (1) on the solitary ground that it is inconsistent with the established practice of that Court,—a practice based on cases which did not consider rule 9 of the Privy Council rules.

For the reasons given above, I am of opinion that order XLV, rule 7 of the Code of Civil Procedure, and rule 9 of the Privy Council rules can be so read as to make them consistent with each other and that a reading thereof which makes them consistent should be preferred to the one which makes them inconsistent. If, however, the two are irreconcilable, rule 9 should, in my opinion, prevail, especially since it confers a power which is indispensable for doing justice in certain cases of an exceptional nature. I am not impressed by the suggestion that once the existence of such a power is conceded, a flood gate will be opened for applications for extension of time, which it was the intention of the legislature to avoid in enacting Act XXVI of 1920. The Judges of the High Court can be trusted to discriminate between cases in which ends of justice demand an extension of time and those in which they do not. As the majority of the Judges constituting the Full Bench hold that the Court cannot condone the delay in depositing costs of translating and printing, it is not necessary for me to consider whether in the circumstances of this case delay ought to be condoned.

Niamatullah, J.

BY THE COURT :—As the security and the printing charges were not paid within time, we cancel the certificate and direct that the applicant do pay the costs of the Government Advocate in this matter, which we assess at **Rs.150.**

(1) (1927) I.L.R., 51 Bom., 430.

PRIVY COUNCIL

*J. C.**
1933
April, 28

COMMISSIONER OF INCOME-TAX *v.* BASANT RAI TAKHAT SINGH

[On appeal from the High Court at Allahabad]

Income-tax—Other sources—Deduction—Expenditure—Expenditure not in year of assessment—Income-tax Act (XI of 1922), section 12, sub-section (2).

An expenditure incurred by an assessee to income-tax is not a permissible deduction under section 12, sub-section (2) of the Indian Income-tax Act, 1922, unless it has been incurred in the year in respect of which arise the income, profits and gains forming the basis of the assessment.

Judgment of the High Court reversed.

APPEAL (No. 68 of 1932) from a judgment of the High Court (10th of July, 1931) upon a reference to that Court under section 66 of the Indian Income-tax Act, 1922.

The respondents, a joint Hindu family, had been assessed to tax for the year 1929-30 under the Indian Income-tax Act, 1922, in respect of the income, profits and gains derived by them from, *inter alia*, buildings erected by them upon land leased to them. They had not appealed from the decision of the High Court that the assessment in question was properly made under section 12 (''other sources''), not section 9 (''property''), or section 10 (''business''). The only question arising upon the present appeal by the Commissioner was whether the respondents were entitled under section 12, sub-section (2), to an allowance in respect of expenditure incurred by them before the 1st of April, 1928, in erecting the buildings.

The terms of the reference to the High Court, and the facts of the case, together with the terms of the material provisions of the Act, appear from the judgment of the Judicial Committee.

**Present*: Lord TOMLIN, Lord RUSSELL of KILLOWEN, and Sir GEORGE LOWNDES.

The learned Judges of the High Court (MUKERJI and ALLEN, JJ.) were of opinion that as the assessee would lose the advantage of his expenditure upon erecting the buildings at the conclusion of the lease the expenditure was not of a capital nature and that he was entitled to an allowance in respect of it. They held that the allowance should be in the form of an annual deduction of a thirtieth part of the expenditure,—the lease being for 30 years.

1933. April 27, 28. *Dunne, K. C.*, and *R. P. Hills*, for the appellant:

The only question upon this appeal is whether the allowance claimed is permissible under section 12, sub-section (2) of the Act.

[Lord TOMLIN:—Should not the assessment have been under section 9?]

That question does not arise as the assessee has not appealed from the decision of the High Court that in respect of the income in question he was assessable under section 12, not under section 9 or section 10. The allowance was claimed as a deduction to replace his capital, but the sums deducted formed part of the assessee's income and were not an "expenditure" so as to be a permissible allowance under section 12, sub-section (2). By section 4 "all income" under each of the heads mentioned in section 6 was taxable subject to the deductions specifically allowed. Section 12 does not provide for an allowance for depreciation of capital value. It is a well established principle under the English Income-tax Acts that even if sums are actually set aside for that purpose they still form part of the taxable income. *In the matter of Gooptu Estates, Ltd.* (1), referred to by the High Court, appears to recognize that no allowance could be made under section 12 for the wasting of an asset.

(1) (1929) I. L. R., 57 Cal., 910 (917).

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[Lord RUSSELL of KILLOWEN:—Must not the "expenditure" referred to in section 12, sub-section (2), be made in the year of assessment?]

Yes, each year is a self-contained period for the purpose of assessment: *Income-tax Commissioner* v. *Chitnavis* (1). If the Board take that view, it is not now necessary to discuss further the other question which, however, is very important.

The respondent did not appear.

April, 28. The judgment of their Lordships was delivered by Lord TOMLIN:

This is an appeal by the Commissioner of Income-tax of the United Provinces of Agra and Oudh from a judgment of the High Court of Judicature at Allahabad, dated the 10th of July, 1931, upon a reference of questions made to the High Court by the Commissioner of Income-tax under section 66 of the Indian Income-tax Act, 1922.

The question arises in this way: The assessee is a Hindu undivided family. The assessment in question was an assessment made for the year 1929-30. The assessee was assessed on an income of Rs.57,979. Of this Rs.14,425 were derived from property owned by the assessee and were assessed under section 9 of the Income-tax Act. The remainder, Rs.43,554, were assessed under section 12 and were derived from the rents of buildings erected by the assessee upon land leased from the Agra Cantonment authority.

The assessee appealed and his appeal was rejected by the Assistant Commissioner. He then applied under section 66 that certain questions of law alleged to arise should be referred to the High Court.

The material facts are these: The assessee took a lease for twenty-five years from the Agra Cantonment authority. It does not appear when that lease commenced. Under the terms of the lease he had to erect

(1) (1932) L. R., 59 I. A., 290.

certain permanent buildings which would become the property of the lessors on the determination of the lease. He erected those buildings. As from the 1st of April, 1928, he had a fresh lease of the same property for thirty years. It does not appear whether the second lease was taken at or before the expiration of the first lease. The second lease also contained covenants as to building similar to those in the first lease, but in fact, of course, the buildings had already been erected. Under the second lease the buildings would become the property of the lessors at the determination of the lease. The second lease also contained provisions under which the lessee had the right of renewal for two consecutive periods of thirty years. In the case of each renewal, it was open to the lessors to increase the rent by an amount not exceeding 50 per cent. of the rent for the preceding period.

In those circumstances the Commissioner referred to the High Court three questions. The first was:

"Where the assessee has taken land on a long lease, under which the land, together with the buildings thereon, will revert to the possession of the lessor on the expiry of the lease, has erected thereon masonry buildings and has received rents from lessees of the buildings, is the tax payable by the assessee in respect of the rents to be determined in accordance with section 9, or with section 10, or with section 12?"

The second question was:

"In the circumstances stated in question (1) is the assessee entitled, in accordance with section 12, to allowance for the expenditure incurred in the erection of the buildings?"

The third question was:

"Is the allowance receivable in the form of an annual deduction equal to the amount of the expenditure divided by the years of the term for which the assessee holds the land on lease?"

The first of those questions was answered by the Court holding that the assessment should be made under

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section 12, which was, in fact, the section under which the Commissioner had proceeded.

In regard to the second and third questions, the Court held that the assessee was entitled to a deduction from the rents in order to ascertain the taxable amount and that the deduction for the year of assessment should be one-thirtieth of the amount expended in erecting the buildings.

The assessee has not appealed from the decision of the Court that the assessment was properly made under section 12, but the Commissioner has appealed against the answers to the second and third questions by virtue of which a deduction is to be allowed to the assessee. The assessee has not appeared before their Lordships' Board.

Now the relevant sections of the Act are sections 3, 4, 6, 9, 10 and 12.

Section 3, which creates the charge, says:

"Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals."

Section 4, sub-section (1), is as follows:

"Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

Then there are certain exceptions which need not be referred to, and section 6 provides: "Save as otherwise provided by this Act, the following heads of income, profits, and gains, shall be chargeable to income-tax in

the manner hereinafter appearing, namely''—then there is a number of items of which the third is ''Property'', the fourth is ''Business'' and the sixth is ''Other sources''.

Section 9 deals with the head ''Property'' and states : ''The tax shall be payable by an assessee under the head 'Property' in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of his business, subject to the following allowances, namely''—then a number of allowances is set forth which may be made.

Section 10 deals with ''Business'' and provides : ''The tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him.'' It also makes provision as to how those profits are to be calculated.

Section 12 deals with ''Other sources'' and provides : ''The tax shall be payable by an assessee under the head 'Other sources' in respect of income, profits and gains of every kind and from every source to which this Act applies (if not included under any of the preceding heads).'' It is to be noted that section 12 does not come into operation until the preceding heads are excluded. Then under sub-section (2) of section 12 it is provided : ''Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee.''

Now in the circumstances of this case and having regard to the course which the case has taken and the attitude of the respondents their Lordships feel themselves constrained to consider the matter upon the footing that

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section 12 is the proper section under which the assessment should be made, and accordingly they propose to deal with the matter upon that footing, but in so doing their Lordships must not be taken to be accepting the view that in fact section 12 is the proper section, or that section 9 is not applicable to this case.

The question, therefore, is whether the allowance which the High Court have considered a permissible allowance is in fact justified by the terms of section 12. In their Lordships' judgment it is not. Under section 12, sub-section (2), is specified what may be allowed as an "allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee." In their Lordships' view, on the true construction of that sub-section, the allowance for any expenditure incurred must be an allowance for expenditure incurred in the year in respect of which arise the income, profits and gains forming the basis of the assessment. Upon that footing, therefore, there can be no justification for deducting from the profits and gains something in respect of expenditure, whether it be regarded as capital expenditure or not, which occurred many years before.

In those circumstances their Lordships are of opinion that upon the footing already indicated the respondent was not entitled to the deduction, and that the answers given to the second and third questions, the subject of this appeal, are wrong and should be reversed and the appeal allowed accordingly. Their Lordships will humbly advise His Majesty to that effect. The respondents will pay the costs of the appeal.

Solicitor for appellant: *Solicitor, India Office.*

REVISIONAL CRIMINAL

Before Mr. Justice Bajpai

EMPEROR *v.* MATHURA AND OTHERS*

1933
February, 10

Criminal Procedure Code, sections 15, 16, 350A—*Bench of Magistrates—Bench of three, with quorum of two—Trial begun before three, but heard throughout and decided by two—Validity.*

At the commencement of a trial all the three Magistrates constituting a Bench of Honorary Magistrates were present, but at some of the subsequent hearings one of them was absent. The other two Magistrates were present at all the hearings and it was they who delivered the judgment. According to the rules framed by the District Magistrate under section 16 of the Criminal Procedure Code, two Magistrates were to form a quorum, and the same two Magistrates must hear a particular case from start to finish and sign the judgment. *Held*, that the trial was valid. *Chiteshwar Dube* v. *King-Emperor* (1), distinguished.

Mr. *Gopalji Mehrotra*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

BAJPAI, J.:—The applicants before me were convicted by a Bench of Honorary Magistrates at Jaunpur under sections 323 and 452 of the Indian Penal Code. Their convictions were affirmed in appeal by a Magistrate of the first class with appellate powers. A revision filed by them before the Additional Sessions Judge of Jaunpur was also dismissed. In revision before me it is argued that the conviction is illegal, inasmuch as there was a defect in the constitution of the Bench.

The facts are that there is a Bench of Honorary Magistrates at Jaunpur consisting of three members (1) Babu Sundari Prasad, (2) Babu Lakshmi Shankar, and (3) Maulvi Muhammad Abbas Khan. The present trial commenced before all the three Magistrates, but at

*Criminal Revision No. 737 of 1932, from an order of M. B. Ahmad, Esq., Additional Sessions Judge of Jaunpur, dated the 6th of June, 1932.

(1) [1932] A. L. J., 42.

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some of the subsequent hearings Maulvi Muhammad Abbas Khan was not present. The other two Magistrates, however, were present at all the hearings, including the first and the last, and it is these two Magistrates who delivered the judgment. It is contended before me that inasmuch as the trial commenced before three Magistrates the trial should have continued before the same three, and the fact that Maulvi Muhammad Abbas Khan was absent at some of the hearings and at the time of the delivery of judgment makes the trial invalid, and the judgment passed by the other two Magistrates is liable to be set aside.

Under section 15 of the Code of Criminal Procedure the Local Government may direct any two or more Magistrates in any place outside the Presidency Towns to sit together as a Bench. In the present case the Local Government has directed three Magistrates at Jaunpur to constitute a Bench. It is absolutely necessary under section 15 that the Bench should consist of at least two Magistrates and on that score there is no defect in the constitution of the Bench. Under section 16 of the Code of Criminal Procedure the Local Government may, or subject to the control of the Local Government the District Magistrate may, make rules for the guidance of Magistrates' Benches. The District Magistrate of Jaunpur has framed certain rules under section 16 and the rule as supplied to me at the Bar runs as follows: "Two Magistrates shall form a quorum; and the same two Magistrates must hear a particular case from start to finish and sign the judgment, except when under section 350A of the Code of Criminal Procedure there has been a change in the constitution of the Bench, for example, some particular Magistrate has ceased to work temporarily or permanently under proper orders." The position, therefore, is that in Jaunpur two Magistrates form the quorum of the Bench and under the rule just mentioned the same two must hear

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a particular case from start to finish and sign the judgment. In the present case, when the case was started there were three Magistrates and throughout the conduct of the case there was a quorum of two and the judgment was delivered by those Magistrates only who were present throughout the case. I am, therefore, of the opinion that the trial is not irregular. It is, however, argued that the constitution of the Bench at the inception of the trial was of three Magistrates and, therefore, this number became rigid and inflexible for all the subsequent hearings and, therefore, the fact that certain hearings took place before two of the Magistrates only and the fact that the judgment was delivered by two only makes the trial illegal. No authority has been cited for this proposition, but certain cases having an indirect bearing have been placed before me, from which it was argued that there has been a defect in the constitution of the Bench at some of the hearings and, therefore, I should order a re-trial. The strongest case on behalf of the applicants is the case of *Emperor* v. *Mohidin* (1). In this case a Bench of three Special Magistrates heard the prosecution evidence, but owing to the absence of one of the Magistrates later on the remaining two went on with the trial, heard the defence evidence and convicted and sentenced the accused. It was held that the trial was void, but this decision was arrived at by reason of rule 4 of the rules for the guidance of the Special Magistrates' Bench there. That rule runs as follows: "If for any cause it is found necessary to adjourn the hearing of the case after the evidence has been partly taken, the trial must be completed before the same Magistrates who commenced it, or must be held afresh before a different set of Magistrates." That case, therefore, has no application to the facts of the present case. Next, reliance was placed upon the case of *Chiteshwar Dube* v. *King-Emperor* (2). I sent for the record of this case and from it I find that the Bench at

(1) (1919) I. L. R., 44 Bom., 400. (2) [1932] A. L. J., 42.

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Ghazipur consisted of three Magistrates, (1) Pandit Paras Ram, (2) Pandit Lachhmi Narain, and (3) Maulvi Abdul Mughni. The last, however, was not present on several occasions when witnesses were examined, but he joined in signing the judgment. The trial was held to be invalid. I am in perfect agreement with this view. In that case, although two of the Magistrates who took part in the decision had heard the evidence throughout, it is impossible to say to what extent their opinion was influenced by the third Magistrate who had only heard a portion of the evidence. In the case before me the presence of Muhammad Abbas Khan was unnecessary, because the quorum consists of two Magistrates, and he was not a party to the judgment and, therefore, he did not in any way influence the opinion of the other two. The rule mentioned by me in the beginning of my judgment has in no way been offended. Section 350A, which has been added by the Amending Act XVIII of 1923, also lends support to the view which I have taken. My opinion is also fortified by the following cases: *Karuppana Nadan* v. *Chairman, Madura Municipality* (1), *Venkatarama Aiyar* v. *Saminatha Aiyar* (2), and *Khuda Baksh* v. *Emperor* (3). There is no force in this revision and I dismiss it.

(1) (1898) I.L.R 21 Mad., 246. (2) (1914) I. L. R., 38 Mad., 797.
(3) (1917) 15 A. L. J., 463.

APPELLATE CRIMINAL

Before Mr. Justice Young and Mr. Justice Bennet

EMPEROR *v.* FAUJDAR AND OTHERS*

1933
February, 11

Criminal Procedure Code, section 162—*Evidence Act* (*I of* 1872), *section* 27—*Statement by accused person to police officer—Part of statement relating to discovery of stolen articles—Admissibility in evidence—Criminal Procedure Code, sections* 1(2) *and* 4(2)—*Special law—Evidence Act not affected by Criminal Procedure Code, except where specifically provided.*

Section 162 of the Criminal Procedure Code, as amended by Act XVIII of 1923, does not alter the provisions of section 27 of the Evidence Act; and a statement, or part of a statement, made by an accused person to a police officer which is admissible in evidence by virtue of section 27 of the Evidence Act is not rendered inadmissible by the amended section 162 of the Criminal Procedure Code.

Section 162 is not intended to apply to statements made by accused persons, which are governed by section 164 and by sections 24 to 27 of the Evidence Act; there is, therefore, no contradiction between section 162 of the Criminal Procedure Code and section 27 of the Evidence Act. Further, by virtue of section 1(2) of the Criminal Procedure Code, any provision of the Evidence Act, which is a "special law" as defined by section 4 of the Code, cannot be affected by the Criminal Procedure Code in the absence of a specific provision to the contrary made in that Code; and there is no such specific provision modifying or altering section 27 of the Evidence Act.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Mr. *Jawahir Lal*, for the accused.

YOUNG and BENNET, JJ. :—This is an appeal by Government against the acquittal of three *doms* Faujdar, Sita, and Balli, of the offence of dacoity, and also the appeal of four persons who have been convicted of the offence of dacoity, Ishri Kurmi, Shiva Gobind Ahir,

*Criminal Appeal No. 461 of 1932, by the Local Government, from an order of H. P. Verma, Sessions Judge of Ghazipur, dated the 23rd of February, 1932.

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Damri Gond, and Dudhnath Dusadh. These four persons have been sentenced to six years' rigorous imprisonment by the Sessions Judge of Ghazipur.

* * * * *

Considerable argument was made over certain points of law which are not really very important for the purpose of this case, but as the matter has been argued before us we may state our findings on the points. As already noted, the pointing out of property by the *doms* is not, in our opinion, clearly proved, but the learned counsel, Mr. *Jawahir Lal*, argued on the supposition that if we were to accept the evidence of the Sub-Inspector on the point, this evidence would not be admissible. The evidence of Sub-Inspector Rafiullah Khan is as follows: "Then Sita took us to the house of Jebodh and he asked Jebodh to hand over the clothes which he had given to him." It was contended by learned counsel that this evidence was not admissible because of the provisions of section 162, Criminal Procedure Code. On the other hand, it was contended that the evidence was admissible under section 27 of the Indian Evidence Act which states as follows: "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." There is no doubt that section 27 as it stands does cover evidence of this nature. This has been held by a Full Bench of this Court in the case of *Queen-Empress* v. *Babu Lal* (1) by a majority of four Judges against one. But the argument of learned counsel is that subsequent to that Full Bench ruling the wording of section 162 of the Criminal Procedure Code has been altered and this section now runs as follows: "No statement made by any person to a police officer in the course of an investigation under

(1) (1884) I. L. R., 6 All., 509.

this chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made." The argument of learned counsel is that under this section a "statement made by any person to a police officer" includes a statement by an accused person to a police officer, and that such a statement cannot be used for any purpose. Therefore he argues that a statement such as one under section 27 of the Indian Evidence Act is now barred from being given in evidence if it is made to a police officer, and he argues that the statement would only be admissible in evidence if it was given to a person other than a police officer. There are, in our opinion, two defects in the argument of learned counsel for the defence. In the first place section 161 of the Criminal Procedure Code deals with the examination by a Sub-Inspector of any person supposed to be acquainted with the facts and circumstances of a case. The next section, in our opinion, deals with the use of the statement made to the Sub-Inspector and it is not intended to include statements by accused persons. It is true that the words "no statement made by any person" are general and if they stood alone would include accused persons, but the statements of accused persons are governed by section 164 which follows, and there are also provisions in sections 24—27 of the Indian Evidence Act in regard to statements made by accused persons. Section 163 repeats certain provisions of section 24 of the Indian Evidence Act and section 164 makes provision for recording statements or confessions by witnesses or accused persons by a Magistrate. Now we have to consider whether in regard to statements made by accused persons the Criminal Procedure Code intended in section 162, as amended by Act XVIII of 1923, to alter the provisions of section 27 of the Indian Evidence

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Act. We consider that if the legislature had intended to alter the provisions of section 27 of the Indian Evidence Act, the legislature would have repealed that section or amended it. We do not think it at all probable that the legislature would have proceeded to enact provisions in section 162 of the Criminal Procedure Code which would be contrary to what was laid down in section 27 of the Indian Evidence Act. Learned counsel on his view argues that there is a contradiction between the two sections, but if we read section 162 of the Criminal Procedure Code as not applying to the statements of accused persons there is no contradiction between the two sections. The first proviso in section 162 deals with the calling of a witness for the prosecution, and, further, section 162, sub-section (2) deals with the provision in section 32, clause (1) of the Indian Evidence Act which is a provision relating to statements by a deceased person as to the cause of his death in cases in which the cause of the death comes into question. We note that in section 162 there is a reference to two sections of the Indian Evidence Act, sections 145 and 32, clause (1). Therefore, in enacting section 162 of the Criminal Procedure Code the legislature had in mind the provisions of the Indian Evidence Act.

But there is another quite separate ground which vitiates the argument of learned counsel; that is, that in section 1, sub-section (2), Criminal Procedure Code it is provided: "but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force." Now a special law is defined in section 41 of the Indian Penal Code as a law applicable to a particular subject. The Indian Evidence Act, therefore, is such a special law, as it is a law specially applicable to the subject of evidence. Section 4, last paragraph, of the Criminal Procedure Code says: "All words and

expressions used herein and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code." Therefore the provision in the Criminal Procedure Code is that in the absence of a specific provision to the contrary in the Criminal Procedure Code nothing in that Code shall affect anything in the Evidence Act. If, therefore, the legislature had desired to modify or alter the provisions of section 27 of the Indian Evidence Act by anything provided in section 162 of the Criminal Procedure Code, the legislature would have made a specific provision to that effect. There is no such specific provision to that effect, and, therefore, the conclusion is that the legislature did not intend to modify section 27 of the Indian Evidence Act by anything provided in section 162 of the Criminal Procedure Code. We are, therefore, of opinion that evidence of the nature stated is admissible in cases like the present.

On the merits of this case we consider that Ishri, Shiva Gobind, and Damri have been properly convicted, as there is against them their own confession and evidence that they gave up property. Accordingly, we dismiss the appeals of Ishri, Shiva Gobind, and Damri and uphold the convictions and sentences passed upon them under section 395 of the Indian Penal Code. As regards the appellant Dudhnath he did not make any confession and no property is shown to have been produced by him or by any one on his behalf. He was identified by Mst. Sukharani only, but we have held that her identification evidence is of no weight. The mere fact that the complainant pointed out in court Dudhnath as having taken part in the dacoity is of no weight. There is also, no doubt, the fact that he was named in the three retracted confessions, but that alone is not sufficient for a conviction. Accordingly, we allow the appeal of Dudhnath and acquit him of the offence under section 395 and set aside the sentence and direct that he be set at liberty.

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In regard to the appeal of the Local Government against the acquittals of Faujdar, Sita, and Balli we consider that the evidence against them is not sufficient for conviction and we agree with the learned Sessions Judge on this point. Accordingly, we dismiss the appeals against these three persons and we direct that they be released forthwith.

FULL BENCH

Before Sir Lal Gopal Mukerji, Acting Chief Justice, Mr. Justice King, Mr. Justice Niamat-ullah, Mr. Justice Bennet and Mr. Justice Iqbal Ahmad

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February, 20

RAM SARUP (PLAINTIFF) *v.* TOTI AND ANOTHER (DEFENDANTS)*

Stamp Act (II of 1899), *section* 5 *and article* 62(*c*)—*Transfer by one deed of the interests secured by several bonds—Consideration a single sum without any apportionment—Stamp duty chargeable—"Distinct matters"—General Clauses Act (X of* 1897), *section* 13—*Whether applicable to Stamp Act, article* 62(*c*).

A person, who was the obligee of each of 29 bonds and mortgage deeds executed by different persons in his favour, transferred his interest in all these bonds and mortgage deeds to another person by executing one instrument comprising them all; the consideration was one lump sum, without any specification or apportionment as between the several items. On the question of the proper stamp duty payable,—

Held (NIAMAT-ULLAH and BENNET, JJ., dissenting) that section 5 of the Stamp Act, dealing with instruments comprising or relating to several distinct matters, did not apply to the case, and that under article 62(*c*) of the Stamp Act, read with section 13 of the General Clauses Act, the stamp duty chargeable on the deed in question was Rs.5.

[*Per* NIAMAT-ULLAH, J. :—Section 5 of the Stamp Act does not apply to the case; but under article 62(*c*) itself the proper

*Miscellaneous case No. 600 of 1932.

stamp duty payable is the sum of all the duties paid on the bonds and mortgage deeds, subject to the maximum of Rs.5 for any one bond or deed. The application of section 13 of the General Clauses Act to give any other interpretation would lead to serious difficulties.]

[*Per* BENNET, J. :—Section 5, and article 62(*c*), each applies to the case, with the same result, namely that the proper duty on the instrument in question is the aggregate of the amounts of duty payable on each of the 29 transfers contained in the instrument. The application of section 13 of the General Clauses Act would be repugnant to the subject. Where a schedule laying down a scale of charges does not expressly provide for the same charge to apply to a number of articles and to one only, the result should not be obtained by the introduction of a rule of interpretation that the singular includes the plural.]

THIS was a reference under section 60 of the Stamp Act made by the Munsif of Pilibhit, through the District Judge of Bareilly, under the following circumstances. The plaintiff brought a suit in the court of the Munsif to recover a certain sum of money on foot of a bond which had been sold in his favour by the defendant No. 2, the defendant No. 1 being the executant of the bond. By this sale deed the plaintiff purchased not only the bond in suit but also 28 other bonds, all sold to him by the defendant No. 2. The sale consideration was Rs.2,425, although at the date of the sale the total amount due on the several bonds sold was a much larger sum. The sale deed bore a stamp duty of Rs.5. The question arose whether the duty was sufficient. The Munsif himself thought that the stamp of Rs.5 might be sufficient; but not being free from doubt he consulted the Chief Inspector of Stamps and that officer was of opinion that the stamp duty should have been calculated by treating the sale deed as 29 sale deeds,—there being one sale deed for each of the 29 bonds. He was further of opinion that section 5 of the Stamp Act applied and each bond should be treated as a "distinct matter".

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Thereupon this reference was made, which was referred for decision to a Full Bench.

Messrs. *B. Malik* and *G. S. Pathak*, for the plaintiff.

Mr. *Muhammad Ismail* (Government Advocate), for the Crown.

KING, J.:—The instrument in question transferred the interests in 29 bonds. The consideration for the transfer was Rs.2,425, although the sum of the amounts due on the bonds was Rs.6,040-5-3.

The point which we are asked to decide is whether the instrument should be held to be an instrument "comprising or relating to several distinct matters", within the meaning of section 5 of the Indian Stamp Act, 1899. The learned Munsif who made the reference held that the instrument was clearly a "transfer" within the meaning of article 62(*c*) which provides for the duty chargeable on an instrument of transfer of any interest secured by a bond. But he doubted whether under section 5 the instrument should be held to comprise or relate to 29 "distinct matters" and therefore to be chargeable with the aggregate amount of the duties with which 29 instruments of transfer, each transferring the interest secured by one bond, would be chargeable.

In my opinion, the provisions of section 5 do not apply. I do not think the expression "distinct matters" in section 5 can be held to mean or to include distinct items of property. Take the case of a sale deed transferring two houses and a grove of 50 trees for a consideration of Rs.5,000. Such an instrument is a "conveyance" as defined in section 2(10). Under article 23 the duty is chargeable according to the amount of the consideration for the conveyance. The consideration being Rs.5,000, the duty is readily ascertainable from the scale set forth in article 23. Now if it is held that section 5 is applicable to such an instrument on the ground that it relates to several distinct items of property, and, therefore, to

several "distinct matters", then it would be chargeable with the aggregate amount of duties chargeable on 52 instruments, i.e. one instrument for each house and one for each tree. Although the parties might have agreed to a lump sum as consideration for the sale of the whole lot of property, it would be necessary for them to put some arbitrary valuation upon each item in order that the aggregate amount of duties might be ascertained. Such a procedure seems not merely vexatious but contrary to the language of the statute. Article 23 requires the duty to be charged on the amount of consideration for the conveyance and not on the amount of consideration for each item of property included in the conveyance. Even if the details of the consideration were set forth, by specifying the price of each item of property, I do not think that the position would be altered. For the purpose of charging duty we have to look to the total consideration for the conveyance and not to the items included in the total. Similar principles are applicable to an instrument of transfer (article 62).

In my opinion the expression "distinct matters" is equivalent to *distinct transactions*. One transaction may comprise or relate to one hundred distinct items of property. But if it is one transaction then section 5 will not apply. In the case before us, there was one transaction transferring 29 bonds for a consideration of Rs.2,425 and I do not think any distinction can be made, from the point of view of interpreting section 5, between actionable claims and other classes of property. No authority has been shown to us in support of the view that section 5 is applicable to an instrument such as the one in question. The Chief Inspector of Stamps states that the Boards of Revenue in the United Provinces and Madras have taken that view, but no decisions by these authorities have been shown to us, so we are unable to take their reasoning into consideration.

If there is any judicial authority for the proposition that a sale deed comprising several items of property

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should be held to comprise several "distinct matters" within the meaning of section 5, it is inconceivable that no such authority can be cited, as such sale deeds are very frequently executed. For the above reasons I hold that section 5 does not apply to the instrument in question.

A further point has been raised in arguments before us. It is suggested that article 62(*c*) applies only to an instrument transferring the interest secured by *one* bond, and that an instrument transferring the interests secured by two or more bonds would be a "conveyance" governed by article 23. I regret that I am unable to concur in this view.

Article 62(*c*) enacts that the proper stamp duty on an instrument of transfer "of any interest secured by a bond, if the duty on such bond does not exceed Rs.5" shall be "the duty with which such bond is chargeable, and in any other case" shall be "Rs.5". The article speaks of "a bond". We are admittedly bound to follow the well known rule of interpretation embodied in section 13 of the General Clauses Act, 1897, i.e. that words in the singular shall include the plural, unless there is anything repugnant in the subject or context. So, we must apply the rule to bonds (in the plural) unless there is any such repugnancy. I cannot see any such repugnancy, as it seems to me that the words can be read in the plural without difficulty, thus: 'The proper stamp duty on a transfer of any interests secured by bonds shall be the duties with which such bonds are chargeable, if the duties on such bonds do not exceed Rs.5, and shall be Rs.5 in any other case.' It is argued that the expression "the duties" would be meaningless unless we add some words such as "the sum total of the duties" or "the aggregate amount of the duties". It is true that the expression, "the duties", would have to be understood as meaning *the sum of* the duties, but I think the extra words can be tacitly understood without being expressed.

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The language of article 62(*a*) may be referred to by way of example. This lays down that the proper stamp duty on a transfer of shares (plural) shall be one-half of the duty payable on a conveyance (No. 23) for a consideration equal to the value of the share (singular). Now in this case it is beyond controversy that the word "share", in the second column, must be construed as including the plural, because the plural "shares" is used in the first column. So, it is absolutely necessary to read the last words in the second column as "equal to the values of the shares". Is this expression meaningless? I think not. In my opinion it means 'equal to *the sum of* the values of the shares, or *the aggregate amount of* the values of the shares', and it can readily be understood in that sense without any extra words being expressly added. Similarly, in article 62(*c*) I see no difficulty in understanding the expression "the duties" as meaning *the sum of* the duties, without any extra words being expressly added. It is a fundamental principle of the interpretation of a statute that one should, if possible, make sense of it and should not reject any expression as meaningless,—"*ut res magis valeat quam pereat*".

In article 62(*c*) I think there is no real difficulty in applying the rule to two or more bonds as well as to one bond. Neither the learned Munsif nor the Chief Inspector of Stamps seem to have felt any such difficulty. They assumed that article 62(*c*) was applicable, although 29 bonds were transferred by one sale deed.

If it is held that article 62(*c*) applies only to the transfer of one bond, and if it is further held that section 5 does not apply to this case, then I think it follows that the instrument under consideration must be treated as a "conveyance" under article 23. To hold that an instrument transferring one bond is a "transfer" (article 62) and that an instrument transferring two bonds is a "conveyance" (article 23) involves such a strange and apparently illogical system of classification that I should

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be reluctant to impute any such intention to the legislature.

King, J.

To hold that the statute has fixed a maximum duty of Rs.5 on an instrument transferring any number of bonds of any value does not seem to me to involve any impossible or improbable assumption. It is clear that a maximum duty of Rs.5 is fixed on an instrument transferring one bond. If no distinction is made as regards duty between the transfer of a bond securing Rs.1,000 and the transfer of a bond securing a lakh of rupees, I fail to see why there should necessarily be any distinction as regards duty between a transfer of two bonds securing a total sum of Rs.1,000 and a transfer of two bonds securing a total of a lakh of rupees.

For the above reason I regret that I cannot accept the view that the word "bond" in article 62(*c*) must be read only in the singular and not in the plural. I agree with the learned Munsif that article 62(*c*) applies to the instrument.

Putting the case at its lowest, there is at least some doubt whether article 62(*c*) does not apply, and the benefit of doubt in a fiscal statute must be given to the subject.

NIAMAT-ULLAH, J. :—This is a reference under section 60, Stamp Act, II of 1899. The case is one in which an obligee under about twenty-nine simple money bonds and mortgage deeds has transferred his rights for one lump sum as consideration without specifying the consideration in respect of any one of them.

The relevant provisions of the Stamp Act to be considered are section 5 and article 62(*c*). Section 5 runs as follows: "Any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under this Act."

The part of article 62 which is relevant for the purposes of this case is as follows :

Description of instrument	Proper stamp duty
Transfer (whether with or without consideration)— * * * *	
(c) of any interest secured by a bond, mortgage deed or policy of insurance—	
(i) if the duty on such bond, mortgage deed or policy does not exceed five rupees;	The duty with which such bond, mortgage deed or policy of insurance is chargeable.
(ii) in any other case	Five rupees.

It is contended on behalf of the Crown that the instrument of transfer in the present case comprises "several distinct matters" within the meaning of section 5 and that consequently it is chargeable with the aggregate amount of duties payable on transfer of each of the bonds and deeds by a separate instrument. The article said to be applicable is 62(*c*) quoted above. I do not think that the deed of transfer in question before us comprises several distinct matters. The word "matter" signifies, in this connection, one transaction or bargain. To determine whether an instrument comprises one matter or more it is essential to find whether the parties negotiated for all the objects transferred as one unit. An important test is whether one lump sum was settled as the consideration for all the objects transferred by one to the other, no separate consideration for each object being part of the bargain, though the estimated value of each might have entered into the calculation of the consideration finally agreed on. The above test is fully satisfied in the present case. The deed mentions one lump sum as the price of the executant's rights under all the deeds. There is nothing to suggest that each deed was the subject of a separate bargain. Another test which may be applied as a rough and ready way of ascertaining whether a document embodies several "distinct

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matters" is to find whether separate deeds can be executed in respect of each of the alleged "matters" without interfering with the terms of the agreement between the parties. Judged by this test the instrument in question cannot be regarded as embodying several distinct matters. For these reasons I hold that section 5 does not apply.

The next question is whether under article 62(*c*) no more than the maximum duty of Rs.5 is payable even though numerous interests under various bonds and mortgage deeds have been transferred. It is contended that under section 13, General Clauses Act, singular includes plural and that, therefore, the same duty, subject to a maximum of Rs.5, is payable. It is argued that all singular nouns occurring in the article should, for the purposes of this case, be read as plural and as the "duties" on the bonds and mortgage deeds exceed Rs.5, no more than that sum is payable on the instrument in question. This construction necessitates the introduction of the word "aggregate" before "duties". This objection is not, however, as serious as the one to be presently mentioned, which may not arise in the case before us, but will have to be surmounted if the singulars in the article are to be read as plurals. It so happens that in this case the aggregate duties on all the bonds amounts to more than Rs.5. Let us take a case in which interests under three bonds and mortgage deeds are transferred and the duties paid on such bonds and deeds are of Rs.2, 1-8, and 1 respectively, so that the aggregate does not exceed Rs.5. In such a case, according to the second column of the article, the duty is determined by "the duty with which *such bond, mortgage deed, or policy of insurance* is chargeable". Which bond or deed are we to take as supplying the determining factor? It is as arbitrary to take the highest, that is Rs.2, as the lowest, that is Re.1, or the aggregate, that is Rs.4-8, any of which

alternatives makes it indispensable that some more words should be read into the article. To my mind the words "a bond, mortgage deed, or a policy of insurance", in the context in which they occur and coupled with the words "such bond etc.", exclude the hypothesis that singular in this article includes plural.

The first column of the first schedule of the Stamp Act is headed as "Description of instrument" and the second prescribes a duty with reference to the description thereof. The word "instrument" is defined in section 2(14) to include "every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished, or recorded". If by an instrument a distinct right is transferred it should be described for the purpose of stamp duty as an instrument of transfer of such right. It may also be an instrument of transfer of another distinct right and to that extent it is another instrument. Where, as in this case, the instrument conveys several distinct rights, some under bonds and some under mortgage deeds, executed by different persons, it cannot be correctly and exhaustively described without reference to the transfer of each of such rights. In my opinion the instrument before us should be described as the instrument of transfer of the interest secured by bond A executed by *X*; also as an instrument of transfer of the interest secured by bond B executed by *Y*; also as an instrument of transfer of the interest secured by the mortgage deed C executed by *Z*; and so on. This being so, the stamp duty should be paid as if there were so many instruments as the number of interests transferred thereunder, though they are to be found within the four corners of one paper seemingly embodying only one instrument. Consideration is not a material element in determining the duty payable under article 62, and, therefore, one "distinct matter" referred to in section 5 may include several transfers all of which were made

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in one and the same bargain or transaction, the consideration being one and entire for all.

Niamat-ullah, J.

In the view I take, the stamp duty should be the aggregate amount of duties paid on the bonds and deeds, interests under which have been transferred, subject to a maximum of Rs.5 in case of each bond or deed. In other words, the duty payable is the sum of all the duties paid on such bonds and deeds, provided that where the duty paid on any one bond or deed exceeds Rs.5 it shall be taken to be only Rs.5.

BENNET, J. :—In this reference the plaintiff argues that the article applicable is 62(*c*)(ii) of the Stamp Act, schedule I. Article 62(*c*) deals with "the transfer of any interest secured by a bond, mortgage deed, or policy of insurance". The present case is one of the transfer of the interest secured by bonds and mortgage deeds. Hence the article is applicable. Article 23 does not apply because it relates to a conveyance "not being a transfer charged or exempted under (No. 62)" and the present case does come under article 62.

The next point is the main contention,—the method of applying article 62. Plaintiff contends that section 13 of the General Clauses Act, Act X of 1897, should be applied and the words in the singular should include the plural, so that article 62(*c*) will include "the transfer of any interests secured by bonds, mortgage deeds . . ." We have to see whether there is anything repugnant in the context or not. Article 62(*c*)(i) will then read :

	Proper stamp duty
if the duties on such bonds, mortgage deeds . . . do not exceed five rupees.	the duties with which such bonds, mortgage deeds . . . are chargeable.

There are 29 bonds and mortgage deeds transferred in the present deed of transfer. If each bond or deed

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were originally stamped with Rs.4, the duties on such bonds or deeds would not exceed Rs.5. But the duties with which such bonds are chargeable would be Rs.4 × 29, that is, Rs.116.

If, however, the duty on each bond or deed is Rs.5 or more, the case would come under article 62(*c*)(ii) and the duty, according to the plaintiff, would be only Rs.5. The theory, therefore, leads to an absurd conclusion. To avoid such a conclusion, it would be necessary not merely to read the singular as the plural, but to introduce some words specifying that the duties should be added together, and the aggregate considered, to see whether (i) or (ii) should be applied. But section 13 of the General Clauses Act does not make such a provision, and it seems strange that the Stamp Act should have omitted to specify that this was intended. Even if we add the duties together, a further difficulty arises from the example given by NIAMAT-ULLAH, J., of what would be the proper stamp duty for the transfer of three bonds of Re.1, Re.1-8, and Rs.2.

Another point to be noted is that article 62 does refer to other transfers which are clearly to be taken in the singular; in (*a*) the shares in an incorporated company cannot be taken to cover transfers of shares in more companies than one, because the deed of transfer has to be filed in the office of the company permanently. Similarly, in the case of (*b*), debentures. Both (*d*) and (*e*) refer to property held under one title, either as Administrator-General or as Trustee. The four classes of exemptions all refer to single transfers of single articles as the transfers are by endorsement.

When (*a*), (*b*), (*d*), (*e*), and the four exceptions refer to the singular in cases where the plural cannot be applied, it does not appear logical to apply the plural to the singular words in (*c*).

In this connection I may observe that reliance has been placed on the occurrence of the word "shares" in

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the first column of article 62(*a*) and "share" in the second column, and it is argued that the word "share" must be construed as including the plural, and if this is done in 62(*a*) it must be done in 62(*c*).

Bennet, J.

Let us examine the matter in the light of provisions in previous Stamp Acts. In Act X of 1862 the provision was:

26. Conveyance or transfer of a share of a Banking Corporation or Joint-Stock Company, whether by deed or endorsement, when the market value of the share transferred does not exceed 100 rupees per share.	4 annas.
When it exceeds 100 rupees and does not exceed 200 rupees.	8 annas.
etc.	etc.

In Act I of 1879 the provision was:

60. Transfer— (*a*) Of shares in a Company or Association	One quarter of the duty payable on a conveyance (No. 21).

In Act II of 1899, the present Stamp Act:

62. Transfer— (*a*) Of shares in an incorporated company or other body corporate;	(One-half) of the duty payable on a conveyance (No. 23) for a consideration equal to the value of the share.

In view of the different forms of expression in these Acts when dealing with the transfer of shares I think that the use of the word "share" in the present Act is merely a grammatical error for "shares" and it does not seem a case in which it is necessary to invoke the assistance of section 13 of the General Clauses Act.

So far I have been considering the context of article 62(*c*).

The General Clauses Act, section 13, states that the rule cannot be applied "if there is anything repugnant in the subject or context". I now proceed to consider whether there is anything repugnant in the subject. The subject of the schedule of the Stamp

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Act is the amount of duty to be charged on every instrument mentioned in it, as laid down by section 3 of the Act. It appears to me to be a subject which is repugnant to the application of the rule that the singular should include the plural. A similar subject is the duty imposed by a Customs schedule. No one would apply to a Customs Officer to reduce a customs duty on the ground that the singular should include the plural.

I consider that these schedules should be treated with mathematical precision and that a rule that the singular should include the plural is out of place in the interpretation of these schedules. It would have been quite easy for the article 62(*c*) to have been expressed thus, if it was intended to cover the case of the plaintiff: "(*c*) of any interest secured by a bond, mortgage deed, or policy of insurance, or by several of such instruments . . ." Where a schedule laying down a scale of charges does not expressly provide for the same charge to apply to a number of articles and to one article, I consider that the result should not be obtained by the introduction of a rule of interpretation that the singular includes the plural.

The second matter in controversy is the meaning to be attached to the three words "several distinct matters" in section 5 of the Stamp Act, Act II of 1899. This section is identical with the first paragraph of section 7 of Act I of 1879, the second paragraph corresponding to the present section 6. I now proceed to examine some rulings on the point. In the *Reference under Stamp Act, section* 57 (1) it was held: "The transaction or matter to which the instrument in question relates is single and indivisible and cannot be treated as relating to two distinct matters within the meaning of section 5 of the Stamp Act. The

(1) (1901) I. L. R., 25 Mad., 3(6).

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instrument contains only one contract, a demise; the option of renewal of the lease is ancillary to it and forms part of the consideration for entering into the lease. . . . In *Referred Case No.* 1 *of* 1876 (1) on a reference by the Board of Revenue, it was held that a conveyance with the usual covenant for title cannot be construed as constituting an indemnity bond, so as to render the document liable to stamp duty as an indemnity bond in addition to the stamp duty to which it is liable as a conveyance. It was there held that an instrument can be regarded as falling under two distinct categories, each requiring a separate stamp, only where there is what is called a 'distinct consideration' for each and not where there is a unity of consideration as in the present case."

This shows that in each of these documents there was a main contract and a subsidiary or ancillary contract which formed part of the consideration for one party. In the present case none of the 29 transfers is subsidiary or ancillary to another, and although the consideration is expressed as a lump sum of money it would be possible for the parties to assign part of it to each transfer, and doubtless they did make some such calculation in arriving at the sum total.

In *Ex parte Hill* (2) there was an arrangement which was partly a lease and partly a usufructuary mortgage. On page 259 it was held: "It seems clear to us that, under these circumstances, the loan is the consideration for the lease and the lease is the consideration for the loan; and that neither part of the arrangement would have been complete without the other. We, therefore, think it impossible to say that the instrument relates to two distinct matters within the meaning of the first clause of section 7 of the General Stamp Act. That clause, in our opinion,

(1) (1876) I. L. R., 1 Mad., 133. (2) (1881) I. L. R., 8 Cal., 254.

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relates only to transactions so distinct in their nature as to be capable of being carried out by two or more instruments instead of one, whereas here the contract is essentially one transaction." This lays down the test—*Whether the transactions can be carried out by two or more instruments instead of one.* In the present case the 29 transfers could be carried out by 29 instruments, assigning to each instrument its part of the total consideration, or merely by a reference to the fact that a lump consideration was paid.

In my opinion the mere fact that the parties are the same does not prevent an instrument from referring to two distinct matters. Nor does the adding up of items of money consideration have such an effect.

This ruling in *Ex parte Hill* has been referred to with approval in the *Reference under Act I of* 1879 (1). This was a case of a lease with hypothecation of property to secure payment of the rent. It was held: "As to the second question, in our opinion the document in question cannot be regarded as an instrument comprising or relating to several distinct matters. The matter to which the instrument relates was the terms upon which the lessors let the land and the lessees took the holding. The mortgage was not a distinct matter from the lease. It was as much the matter of the lease as an ordinary covenant to pay would be part of the matter of the lease. We are consequently of opinion that paragraph 2 of section 7 of Act No. I of 1879 applies to this case. We are fortified in this opinion by the decision of the Calcutta High Court in *Ex parte Hill.*"

These rulings show that matters may be distinct where (*a*) A number of persons with different interests make unconnected agreements with a third party, such as the transfer of some of their separate interests: *Reference under Stamp Act* (2): (*b*) Two parties make

(1) (1894) I. L. R., 17 All., 55(57). (2) (1900) I. L. R., 24 Mad., 176.

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agreements which are not connected. And the test to be applied is whether the transactions can be carried out by two or more instruments instead of one.

I may refer to an analogy which was introduced into argument in regard to this test. It was said that in the present instrument the 29 bonds and mortgage deeds should not form the subject of 29 deeds of transfer any more than a transfer of 29 trees, houses, etc., should be split up. But the analogy is misleading, for the trees, houses, etc., all come under the heading of immovable property owned by the transferor. *A*, the owner of any number of items of immovable property, may execute a single conveyance for transfer of his interest. When an owner acquires new immovable property, it merges in his estate. The new property was, perhaps, derived from a vendor who had a different title from previous vendors to *A*, and to this extent there is a difference. But *A* is the owner of all his immovable property and from this point of view the property is homogeneous. The case of an owner of a number of bonds and simple mortgages is different. He is, no doubt, the owner of all the rights in these documents. But his rights would have to be enforced in separate suits, and he is not the owner of tangible immovable property within the meaning of section 54, Transfer of Property Act. A bond is an "actionable claim" as defined by section 3 of the Transfer of Property Act, and section 130 states that the transfer of an actionable claim shall be by an instrument in writing. And the transfer of the rights under a simple mortgage, being intangible immovable property, must also be by a written instrument. The Stamp Act provides in article 62(*c*) for stamp duty on the transfer of a bond and the transfer of a mortgage deed. The Act takes a bond as a unit and a mortgage deed as a unit. The Act, therefore, deals with a bond and a mortgage deed as separate units for the purposes of transfer. As article 62(*c*)

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provides for the transfer of a bond, there is a distinct provision in the schedule for that matter, and the transfer of several bonds would be "several distinct matters". There is no provision in the schedule for the transfer of several bonds. But there is provision for the transfer of any number of items of property, such as houses or trees, and so the analogy from items of property is misleading. No doubt each bond is an item of property; but it is also a matter for which distinct and separate provision is made in the schedule for its transfer as a single unit, and this is not true of a house or a tree. That is, there is an article which refers to the transfer of "a bond" but no article which refers to the transfer of "a house" or "a tree". They come under the term "property" which comes into the definition of "conveyance" in section 2(10). As regards the argument that "several distinct transactions" is the correct meaning of "several distinct matters" in section 5, I would point out that section 4 uses the word "transaction" for the case of several instruments employed for completing one transaction. The provision is that only the principal instrument shall be charged with the duty. Having used the word "transaction" in section 4, when the Act comes to section 5, if the meaning is 'any instrument comprising or relating to several distinct transactions' why is the word "transactions" not used? Why is there a change to the word "matters"? Is it not because the instrument being executed at one time could always be considered as one transaction? There must be some further idea to make the instrument chargeable with the duties of several instruments. What is this further idea? Is not the simplest solution of this problem that the instrument to be charged with several duties is an instrument which has something in it which would bring it several times under some duty in the schedule? Does not the present instrument come 29

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times under article 62(*c*)(ii)? Does not this amount to "several distinct matters" in the sense that each matter has a distinct provision for itself in the schedule? On this view section 5 and article 62(*c*) harmonise and each applies with the same result to the instrument in question.

I may note one further point. In argument the learned counsel for the plaintiff referred to the cases of *Doe d. Croft* v. *Tidbury* (1), *Wills* v. *Bridge* (2), and some other old English rulings. It was pointed out in *Reference under Stamp Act* (3), at pages 183 and 184 that these cases were decided under a Statute of Anne where the language was quite different from 33 and 34 Vict., Cap. 97, and the Indian Stamp Acts.

For the reasons I have given I agree with the opinion of NIAMAT-ULLAH, J., that the stamp duty on the instrument in question should be the aggregate of the amounts of duty payable under article 62(*c*) on each of the 29 transfers contained in the instrument.

IQBAL AHMAD, J. :—I agree with the judgment that has been delivered by my brother KING, J., and for the reasons assigned by him I hold

(1) That the case does not come within the purview of section 5 of the Stamp Act, and.

(2) That the proper stamp duty on the deed in question was a sum of Rs.5.

MUKERJI, A. C. J.:—This Stamp Reference came on a former occasion before myself and two Hon'ble Judges. As it was found that three distinct views were taken by the three members of the Court, a larger Bench was constituted by the addition of two more Hon'ble Judges. The result, however, has not proved to be as satisfactory as was hoped, for there is still no clear majority in respect of any particular view.

(1) (1854) 14 C. B., 304. (2) (1849) 18 L. J., Exch., 384.
(3) (1900) I. L. R., 24 Mad., 176.

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As no useful purpose is likely to be served by further enlarging the Bench, I have thought it fit to modify my views so that there may be a clear majority on one view. The fact that there has been so much difference of opinion shows that the Stamp Act on the point in question is capable of various interpretations. I think I may accept that interpretation which is for the benefit of the subject, the Act being purely a fiscal one.

Mukerji, A. C. J.

In modification, therefore, of my opinion expressed formerly I hold that section 13 of the General Clauses Act can be made applicable to article 62 of the Stamp Act, as held by two of my brothers, and that, therefore, the stamp duty payable in this particular case will be Rs.5 and no more.

BY THE COURT :—The opinion of the majority of the members of the Court is that section 5 of the Stamp Act does not apply to the case, and that under article 62, read with section 13 of the General Clauses Act, the stamp duty chargeable on the deed in question is Rs.5.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Justice Sir Lal Gopal Mukerji

BACHAULI (PLAINTIFF) *v.* UDAI SINGH AND ANOTHER (DEFENDANTS)*

1933 *February, 24*

Pre-emption—Customary law—Preferential rights—Kumaun customs—"Kinsman" whether includes kinswoman—Married girl is not a kinswoman of her father's family—"Relative of vendor within the third degree"—Such relationship with vendor's husband not sufficient.

A Hindu widow in Kumaun sold the property inherited from her husband, and a suit for pre-emption was brought by a married daughter of the brother of the vendor's husband. According to the customary law of pre-emption in the Kumaun Division, as recorded in Stowell's Land Tenure of

*Second Appeal No. 1400 of 1931, from a decree of A. Hamilton, District Judge of Kumaun, dated the 25th of August, 1931, reversing a decree of Jwala Prasad, Subordinate Judge of Garhwal, dated the 3rd of July, 1930.

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Kumaun Division, a "kinsman" of the vendor, and a "relative of the vendor within the third degree", have preferential claims. The plaintiff claimed to be entitled to pre-empt on either ground. *Held*, that (1) apart from the question whether the word "kinsman" did or did not include a kinswoman, it was clear that the plaintiff by her marriage had gone out of the family and ceased to be a kinswoman of the vendor; and (2) that the plaintiff and the vendor not having descended from a common ancestor, the plaintiff could not come under the category of a relative of the vendor within the third degree. The plaintiff was, no doubt, a relative within the third degree of the vendor's husband, but that did not satisfy the condition.

Mr. *Basudeva Mukerji*, for the appellant.

Miss *L. W. Clarke*, for the respondents.

SULAIMAN, C. J., and MUKERJI, J. :—This is a plaintiff's appeal arising out of a suit for pre-emption in Kumaun. The Pre-emption Act does not apply, but the suit was brought on the basis of the customary law.

Jawaru and Badru were two brothers, after whom their widows, Mst. Dauli and Mst. Katgi, got possession of the estate, half and half. It is assumed that they were in separate possession of these half shares. Mst. Katgi sold her half share on the 4th of November, 1929, to Udai Singh and others, and the present suit was instituted in the first instance by Mst. Dauli for pre-emption of the same. An objection was taken in the written statement that Mst. Dauli had lost all interest because of a gift made by her in favour of her daughter Mst. Bachauli. An application was promptly filed that the name of Mst. Bachauli should be substituted in place of Mst. Dauli and that Mst. Dauli should be allowed to act as the next friend of her daughter. This application was allowed. The lower appellate court has remarked that this procedure was somewhat irregular, but inasmuch as the name of Mst. Bachauli was substituted before the expiry of the period of limitation the irregularity cannot be fatal to the suit.

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The suit was decreed by the first court holding that Mst. Bachauli was a "kinsman" of Mst. Katgi and therefore had a preferential claim. The court also held that she was a relative of the vendor within the third degree. On appeal the learned Judge has come to a contrary conclusion. He has held that the plaintiff could not be regarded as a relative of the vendor within the third degree because she was a female and not a male, and although he was of opinion that she was within the third degree. It seems to us that inasmuch as it is admitted in the plaint that Mst. Bachauli is married, although her husband is living in the house of Mst. Dauli as *ghar jawain*, it is not possible to hold that she is a "kinsman" of Mst. Katgi. If Mst. Katgi has become a member of the family by her marriage, on the same principle Mst. Bachauli has gone out of the family. It is, therefore, wholly unnecessary to decide in this case whether the word "kinsman" in the record of the custom made by Mr. Stowell in his Land Tenure of Kumaun Division at page 46 includes a kinswoman.

As regards the question whether the plaintiff can claim a preferential right on the ground of her being a relative of the vendor within the third degree, we are of opinion that a person would be a relative, whether male or female. But to have the preference the person must be a relative of the vendor within the third degree and not merely a relative of the deceased husband of the vendor. Mr. Stowell on page 47 has pointed out that the method of counting the degree of relationship is to count back to the common ancestor, treating him as No. 1. Mst. Bachauli is, no doubt, within the third degree of the father of Jawaru and Badru, but Mst. Katgi is not a descendant of that ancestor. We are, therefore, unable to hold that she can be regarded as a relative of the vendor within the third degree.

The appeal accordingly fails and is dismissed with costs.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kisch

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February, 24

ONKAR SINGH AND ANOTHER (PLAINTIFFS) *v.* KASHI PRASAD (DEFENDANT)*

Limitation Act (IX of 1908), article 83—Part of purchase price left with vendee for payment to a creditor of vendor—Vendee's failure to pay and consequent payment by vendor —Suit to recover from vendee the amount left with him and interest—Limitation—Terminus a quo.

A decree was sold for Rs.2,500 on the 1st of March, 1923, and the whole of the purchase money was left with the vendee for payment to a creditor who held a decree against the vendor. The vendee did not make the payment, and the vendor borrowed money from a third person on the 10th of December, 1926, and therewith discharged the decree of his creditor. The vendor then sued the vendee on the 9th of December, 1929, for recovery of the Rs.2,500 which had been left in deposit, together with interest thereon at 6 per cent. from the date of the sale. On the question of limitation, *held* that the suit was within time.

If a portion of the purchase money is left with a vendee for payment to a creditor of the vendor, and no time is fixed for payment, there is an implied agreement on the part of the vendee to pay the amount due to the creditor either forthwith or within a reasonable time. If the vendee commits a breach of this implied agreement and fails to pay, he is bound in law to indemnify the vendor for any damage sustained by the latter in consequence of the breach. The suit by a vendor in such cases, where he himself has had to pay the creditor, is not one for the return of the unpaid purchase money that the vendee failed to pay, but is one to enforce the implied contract of indemnity, the breach of which was committed by the vendee by failing to make the payment for which money had been left with him, and the suit comes within the purview of article 83 of the Limitation Act. The time for such a suit, which is one for damages, does not begin to run against the vendor till the damage has actually been suffered by him, i.e. till the date that he has made the payment to the creditor.

Raghubar Rai v. *Jaij Raj* (1), and *Ram Narain* v. *Nihal Singh* (2), distinguished.

*Second Appeal No. 1303 of 1931, from a decree of J. N. Dikshit, Additional Subordinate Judge of Agra, dated the 4th of May, 1931, reversing a decree of C. I. David, Munsif of Agra, dated the 8th of July, 1930.

(1) (1912) I. L. R., 34 All., 429. (2) (1925) 87 Indian Cases, 804.

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Messrs. *P. L. Banerji* and *Shabd Saran*, for the appellants.

Messrs. *K. Verma* and *M. L. Chaturvedi*, for the respondent.

IQBAL AHMAD and KISCH, JJ. :—This is a second appeal by the plaintiffs whose suit for recovery of Rs.2,500 principal and Rs.1,015-10 interest, in all for a sum of Rs.3,515-10 has been dismissed by the lower appellate court. The facts are admitted and are as follows. Jaswant Singh, the father of the plaintiffs, held a simple money decree against one Lal Hans. He sold the decree to Kashi Prasad, defendant-respondent, on the 1st of March, 1923, for a sum of Rs.2,500. The entire consideration was left with the defendant for payment to one Chiranji Lal, who held a decree against Jaswant Singh, the vendor. The defendant did not pay the amount left in deposit with him to Chiranji Lal, and Jaswant Singh borrowed money from a third person by executing a mortgage deed on the 10th of December, 1926, for discharging the decree of Chiranji Lal. Jaswant Singh died, and after his death the plaintiffs brought the suit giving rise to the present appeal, for recovery of the amount that was left in deposit with the defendant for payment to Chiranji Lal and which he had failed to pay. The plaintiffs claimed interest on the amount at the rate of 6 per cent. per annum from the date of the sale deed in favour of the defendant. The date of the cause of action alleged in the plaint was the 10th of December, 1926, the date on which the mortgage deed mentioned above was executed by Jaswant Singh. The suit was filed on the 9th of December, 1929.

The defendant resisted the suit *inter alia* on two grounds: (1) That the sale deed executed by Jaswant Singh in favour of the defendant was fictitious and without consideration, and was executed with a view to defraud certain creditors of Jaswant Singh; (2) that the suit was barred by limitation. Both the courts below

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held that the sale deed executed by Jaswant Singh was for consideration and that the plea of the defendant-respondent that it was fictitious and without consideration was without substance. The finding of the lower appellate court on the point is a finding on a question of fact and is binding on us in second appeal.

The courts below, however, have differed on the question of limitation. The trial court held that the suit was governed by article 61 of the first schedule to the Limitation Act (Act IX of 1908) and, as it was filed within three years from the date of the payment of the decretal amount to Chiranji Lal by Jaswant Singh, the suit was within time. The lower appellate court, on the other hand, without deciding which article of the first schedule to the Limitation Act was applicable, held that the suit was not a suit for damages but was "for recovery of sale money as stated in paragraph 6 of the plaint," and that time began to run against Jaswant Singh from the date of the execution of the sale deed in favour of the defendant, and that the suit was barred by limitation.

The learned Judge of the lower appellate court relied on the decisions of this Court in *Raghubar Rai* v. *Jaij Raj* (1) and *Ram Narain* v. *Nihal Singh* (2) in support of the conclusion arrived at by him that time for the recovery of the amount claimed in the present suit began to run against the plaintiffs from the date of the execution of the sale deed by Jaswant Singh, viz. from the 1st of March, 1923. It was held in *Raghubar Rai's* case that upon the failure of a vendee to pay money due by a vendor to a third party which the vendee agreed to pay and no time was fixed for payment, the breach is committed on the date when the sale deed is executed "and there is no 'continuing breach' within the meaning of section 23 of the Limitation Act nor 'successive breaches' within the meaning of article 115." It was

(1) (1912) I. L. R., 34 All., 429. (2) (1925) 87 Indian Cases, 804.

further observed by the learned Judges in that case that one breach of a contract can furnish only one cause of action and no more and that "actual loss when it occurs is only one of the results of the breach and is not an act of the party who breaks a contract and can, therefore, create no second cause of action." It is to be noted, however, that the determination of the question, whether consequential damage that results to a vendor, who has himself to pay the amount that he left with the vendee to pay to a third party and which the vendee failed to pay, does or does not give a fresh cause of action to the vendor to recover damages, was not necessary for the decision in *Raghubar Rai's* case (1). In that case the suit was brought by the vendor before he had made the payment to the third party, for payment to whom some amount was left with the vendee, and it is clear, therefore, that the observation of the learned Judges that payment of money by a vendor to a third party which the vendee agreed to pay does not give a cause of action to the vendor was *obiter dictum*. Indeed the learned Judges themselves observed in the course of the judgment that "the point that the date on which actual damage was sustained gave the plaintiffs a second cause of action does not arise, inasmuch as the plaintiffs have not yet paid any money to the heirs of Sanchi Ram."

In the case of *Ram Narain* v. *Nihal Singh* (2) also the suit was brought by the vendor before he had himself paid the amount that was left with the vendee for payment to one of his creditors, and it was held that, no time having been fixed in the sale deed for the payment of the amount, the vendee's failure to make the payment constituted a breach on his part on the date when the sale deed was executed, and limitation for a suit to recover damages from the vendee for the breach commenced from that date. In that case SULAIMAN, J., while noticing the case of *Raghubar Rai* (1) observed

(1) (1912) I. L. R., 34 All., 429. (2) (1925) 87 Indian Cases, 804.

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that "the observations in that case suggesting that even if subsequently the plaintiffs have themselves to pay off the mortgage money and redeem the property, they may not have a fresh cause of action to recover from the defendants" were mere *obiter dicta*.

The two cases noted above are distinguishable from the case before us on the broad ground that in those cases the vendor had sued the vendee for the unpaid purchase money before making any payment to the person to whom the vendee had covenanted to pay the amount left with him. In the case before us the suit was brought by the plaintiffs appellants after Jaswant Singh, their predecessor in title, had actually paid the amount that was left with the defendant for payment to Chiranji Lal. It cannot be disputed that actual damage was suffered by the plaintiffs appellants on the date on which they, in consequence of the failure of the defendant to make payment to Chiranji Lal, had to pay the amount due to him. In the sale deed in favour of the defendant no time was fixed for payment to Chiranji Lal, and, therefore, it should be presumed that the parties to the transaction intended that the defendant should make payment to Chiranji Lal forthwith or within a reasonable time. If a portion of the purchase money is left with a vendee for payment to a creditor of the vendor, and no time is fixed for payment, there is an implied agreement on the part of the vendee to pay the amount due to the creditor either forthwith or within a reasonable time. If the vendee commits a breach of the implied agreement by failing to pay the amount left with him by the vendor for payment to the third party, he is bound in law to indemnify the vendor for any damage sustained by the vendor in consequence of the breach of agreement on his part. The suit by a vendor in such cases is not for the return of the unpaid purchase money that the vendee failed to pay, but is to enforce the implied contract of indemnity the breach of which was committed

by the vendee by failing to pay to the third party for whose payment the vendor had left a portion of the purchase money with the vendee, and the suit comes within the purview of article 83 of the first schedule to the Limitation Act. The time against the plaintiff in such a suit does not begin to run till he "is actually damnified". This was the view taken by this Court in *Kedar Nath* v. *Har Govind* (1) and *Sarju Misra* v. *Ghulam Husain* (2).

The distinction between a suit for recovery of unpaid purchase money and a suit for recovery of damages that result to a vendor, in consequence of the breach by the vendee of a covenant to pay the amount that was left with him by the vendor for payment to a third party, is obvious. In the former class of cases the vendor, irrespective of any damage being suffered by him, claims from the vendee the money that belongs to him and that was in deposit with the vendee and which the vendee failed to pay. If the sale is of immovable property and the vendor sues for the unpaid purchase money by enforcement of the statutory charge created in favour of a vendor by section 55 of the Transfer of Property Act, the period of limitation for such a suit is 12 years from the date of the sale deed. Even if the vendor claims a simple money decree for the amount against the vendee, the time begins to run against him from the date of the sale deed.

When, however, the suit by the vendor is for damages that the vendor has suffered by being himself compelled to pay the amount to a third party for whose payment a portion of the sale consideration was left with the vendee and which the vendee failed to pay, the time does not begin to run against the vendor till the damage has actually been suffered by him, i.e. till the date that he has made the payment. But it is to be remembered in this connection that the payment to the third party that

(1) (1926) 24 A. L. J., 550. (2) (1920) 63 Indian Cases, 87.

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can entitle the vendor to sue the vendee for damages must not be gratuitous and must be made by the vendor before the claim of the third party against the vendor has become unenforceable in law. For instance, if the vendor makes the payment to the third party after his claim against the vendor was time-barred, a suit for damages against the vendee cannot lie.

In the case before us, on the date on which Jaswant Singh made the payment to Chiranji Lal, Chiranji Lal's claim was enforceable at law, and, therefore, time began to run against the plaintiffs from the date of the payment. The suit was admittedly filed within three years of that date and was within time.

We hold, therefore, that the lower appellate court was wrong in holding that the suit was barred by limitation. Accordingly we allow this appeal, set aside the decree of the lower appellate court, and, modifying the decree of the trial court, decree the plaintiffs' suit with costs in all courts.

MISCELLANEOUS CIVIL

Before Mr. Justice Young and Mr. Justice Iqbal Ahmad

1933
February, 27

IN RE INDIAN STATES BANK, LTD.*

Companies Act (VII of 1913), *section* 196—*Public examination of officers of company—Report of official liquidator—Specification of fraud—Sufficiency of material for* prima facie *case—Order made* ex parte—*Jurisdiction.*

Section 196 of the Companies Act, on the face of it, gives jurisdiction to a court to make an order for public examination immediately the official liquidator has applied to the court stating that in his opinion a fraud has been committed by any director or other officer of the company. It is, however, under the same section the duty of the court to consider the application with respect to the information contained in it. While the court must consider judicially the application of

* Miscellaneous case No. 784 of 1931.

the official liquidator under section 196, and only pass an order for public examination on being satisfied that there is a *prima facie* case, i.e. reasonable ground for the allegation of fraud upon facts stated in the application, there is no necessity to specify the charge of fraud with the same particularity as would be necessary in a criminal charge under the Indian Penal Code. Once the official liquidator has made out any *prima facie* case of fraud against an officer, the examination is not to be confined to the particular fraud mentioned in the application.

The only objection which an officer of the company can make to an order of the court passed *ex parte* against him for his public examination is one of jurisdiction. He is not entitled at that stage to endeavour to show that the charge of fraud is incorrect. He may, of course, do so on his public examination if he can, and if he succeeds, then under section 196(6) the court may award him costs.

Messrs. *Bhagwati Shankar* and *Jawahar Lal*, for the official liquidator.

Drs. *N. P. Asthana*, *K. N. Malaviya*, and Messrs. *R. K. Malaviya*, *K. C. Mital*, *Krishna Murari Lal*, and *Ram Lal Kapoor*, for the opposite party.

YOUNG and IQBAL AHMAD, JJ. :—A compulsory order for the winding up of the Indian States Bank, Ltd., was passed by this Court. An official liquidator was appointed. The official liquidator on the 2nd and the 9th of December, 1932, applied under section 196 of the Indian Companies Act to the court, stating that in his opinion fraud had been committed by the persons named in his applications in relation to the company since its formation, and asked that the persons so named should be publicly examined. Appended to the application was a schedule in which appeared a statement of the facts as against each of the persons named in the application, from which the official liquidator asked the Court to infer that fraud had been committed by them; for example, as regards one of them, Kunwar Gopi Nath Singh, it was said: "This man was one of the partners of Vidyarthi Tandon & Co., who were the managing agents of the Indian States

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Bank, Ltd., and was one of the signatories to the memorandum and articles of association. He was one of the first Directors of the company and as such made the first allotment of shares, which was fraudulent. He himself did not pay anything for his shares. On the other hand, he fraudulently charged to the company large sums of money in various ways without any right or justification. He was also privy and party to many other fraudulent acts of Vidyarthi Tandon & Co. and his partners B. S. Vidyarthi and A. B. Tandon, which will be the subject-matter of his examination." Similar allegations were made in the schedule against each of the persons sought to be publicly examined. On that application, which was *ex parte*, the Judge in charge of company matters passed orders for the public examination of those mentioned. The Court was subsequently moved by counsel on behalf of certain of these persons to set aside the *ex parte* order, on the ground that the application of the official liquidator did not give the Court jurisdiction to make the order, as the charges of fraud in the application were not made with sufficient particularity. The learned Company Judge referred this matter to a Bench.

The point referred to this Bench necessitates consideration of section 196 of the Indian Companies Act. Section 196(1) is as follows: "When an order has been made for winding up a company by the court, and the official liquidator has applied to the court stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any Director or other officer of the company in relation to the company since its formation, the court may, after consideration of the application, direct that any person who has taken any part in the promotion or formation of the company, or has been a Director, manager or other officer of the company, shall attend before the court on a day appointed by the court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and

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dealings as Director, manager, or other officer thereof." It is contended by counsel for the officers of the company sought to be publicly examined that where a charge of fraud is made, it is a charge of a criminal nature and the person to be examined is entitled to have notice of the charge or charges in the same way as he would have notice under the Indian Penal Code. He prays in aid sub-section (6) of section 196, which enacts that if the person examined is, "in the opinion of the court, exculpated from any charges made or suggested against him, the court may allow him such costs as in its discretion it may think fit", and he quotes as an authority two leading cases on the construction of a similar section in the Companies Winding Up Act (1890) in England, namely *Ex parte Barnes* (1) and *In re Civil, Naval and Military Outfitters* (2). These provisions of the Companies Winding Up Act (1890) together with the Companies Act of 1908 in England have been consolidated in the Companies Act of 1929. The equivalent section of the latter Act is 216. While, of course, this Court, on questions arising under the Companies Act, will pay the greatest respect to the decisions of the Courts in England, it is to be noted that the terms of section 196 of the Indian Act are different from the terms of section 216 of the English Act, and, further, the whole scheme of the English Act, in so far as the official receiver or liquidator in England is concerned, differs very materially from the provisions in the Indian Act as to the duties of an official liquidator when a compulsory order has been made in India.

Sections 195 and 196 of the Indian Act are the only sections which provide for an investigation by a liquidator into the conduct of the officers of the company before liquidation. In England, on the other hand, section 181 of the Act of 1929 gives the official known as the official receiver powers which are not given to the liquidator in India by the Indian Companies Act. Section 181 of the 1929 Act is the same as section 147 of the Act of 1908

(1) [1896] A. C., 146. (2) [1899] 1 Ch., 215.

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which was in force in England when the Indian Act was passed. By section 181 of the English Act the official receiver is entitled to have a statement of the affairs of the company verified by affidavit submitted to him by the officers of the company to be wound up. He is also entitled by rule 50(2) made under the Act to hold personal interviews with the officers of the company for the purpose of investigating the company's affairs, and the duty of every such person is to attend at the official receiver's office and give the official receiver all the information that he may require. It is thus seen that in England the official receiver is entitled to have the fullest information before the equivalent sections in the English Act to sections 195 and 196 of the Indian Act may be brought into use. A further difference to be noted is that in section 216 of the English Act of 1929 it is enacted that the official receiver, in order to give the court jurisdiction to make an order for public examination, has to submit a "further report stating that, in his opinion, a fraud has been committed". In England he has already by this made a preliminary report after the investigation indicated in section 181. The Indian legislature, however, has seen fit not to give the official liquidator the powers of investigation alluded to and has struck out from section 196 the provision as to the further report. It is thus seen that the English decisions on the English Act on this point cannot be held to be binding upon this Court. We have, however, come to a decision on the construction of section 196 very similar to that arrived at by the English Courts in *Ex parte Barnes* (1) and *In re Civil, Naval and Military Outfitters* (2).

We have to consider the provisions of the Indian Act alone. It has been contended by counsel for the officers of the company that section 195 of the Indian Act gives ample power for preliminary investigation. An examination under section 195 has, by the practice of this Court, been a private examination. The Allahabad High Court

(1) [1896] A. C., 146. (2) [1899] 1 Ch., 215.

rules allow the rules of the English Court to be used where there is no rule made for this Court, provided of course that the rules in England are made under a section similar to a section of the Indian Act. The English rules provide for an examination similar to that under section 195 to be held in Chambers, and therefore a similar examination under that section in this country is also held in Chambers. We are not of opinion, however, that the provisions under section 195 give the official liquidator the powers of an official receiver in the Courts in England; for instance, a person summoned under section 195 "may demand his expenses". In India expenses may be a large sum, as the officers of the company in liquidation may have a long distance to travel before arriving in Allahabad. No investigation under section 195 would, therefore, be possible if the officers of the company had so exhausted the funds of the company as to leave nothing in the hands of the liquidator. Section 196 on the face of it gives jurisdiction to a court to make an order for public examination immediately the official liquidator has applied to the court stating that in his opinion a fraud has been committed by any Director or other officer of the company. It is, however, under the same section the duty of the court to consider the application. It appears to us to be clear that such consideration must be a judicial consideration based upon information supplied in the application. The court, before it passes an order for public examination, which is a serious matter, must be satisfied that some facts are given in the application which entitle the court to find that there is a *prima facie* case of fraud against the particular person named. The wording of the Act, which is that the court may "direct that any person shall attend before the court . . . and be publicly examined", does not, in our opinion, justify the court, on a general allegation of fraud in the management of the company, in making an order for the public examination of "any person" not directly implicated in the application of the official liquidator. Justice demands

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that the person against whom there is an allegation of fraud should be clearly named and some facts stated in the application itself to show that a *prima facie* case exists against that person. Once the official liquidator has made out any *prima facie* case of fraud against an officer, the examination is not to be confined to the particular fraud mentioned in the application. It must be remembered that section 196 is a section designed for a thorough investigation of the affairs of the company and the actions of the officers.

It is further to be noted that the only objection which an officer of the company can make to an order of the court passed *ex parte* against him for his public examination is one of jurisdiction. He is not entitled at that stage to endeavour to show that the charge of fraud is incorrect. He may, of course, do so on his public examination if he can, and, if he does, under sub-section (6) of section 196 the court may award him costs.

We are satisfied, therefore, that while the court must consider judicially the application of the official liquidator under section 196, and only pass an order on being satisfied that there is reasonable ground for the allegation of fraud upon facts stated in the application, there is no necessity to specify the charge of fraud with the same particularity as would be necessary in a criminal charge under the Indian Penal Code.

We are of opinion that the particulars given by the official liquidator in his applications as against each of the officers are amply sufficient to comply with the provisions of section 196. It is impossible generally to lay down in each particular case what should be the contents of an application under this section. Each application depends on the facts in the particular case.

The objections are disallowed with costs.

APPELLATE CIVIL

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kisch

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RUP NARAIN SINGH AND ANOTHER (DEFENDANTS) *v.* HAR GOPAL TEWARI AND OTHERS (PLAINTIFFS)*

Provincial Insolvency Act (*V of* 1920), *section* 28—*Vesting of insolvent's property in receiver—Transfer* (*mortgage*) *by undischarged insolvent of property which had vested in receiver—Whether void or only voidable—Mortgaged property re-vesting in insolvent after his discharge—Mortgage enforceable—Transfer of Property Act* (*IV of* 1882), *section* 43.

An alienation by an undischarged insolvent of property belonging to him is not altogether void but only voidable at the option of the receiver. The effect of an order of adjudication is, no doubt, to vest the property of the insolvent which belonged to him, or which he acquires while the order of adjudication is in force, in the receiver, but that does not mean that an alienation by the insolvent is wholly void and cannot be enforced against him after an order of discharge has been passed and the property has been divested from the receiver and re-vested in the insolvent. A distinction must be drawn between cases in which because of a statutory prohibition a person is incompetent to contract or to transfer his property, and cases where the person entering into a contract or transferring his property is under no such disability. Notwithstanding the order of adjudication an insolvent is not incompetent to enter into a contract and there is no statutory provision prohibiting an insolvent from transferring his property.

So where, after a person was adjudicated an insolvent certain property was gifted to him and he executed a mortgage thereof, but the receiver did not raise any objection and did not himself deal with the property, and after an order of discharge had been passed the mortgagee sued to enforce the mortgage, it was *held* that the mortgage was not void and could be enforced, and that section 43 of the Transfer of Property Act applied.

*Second Appeal No. 1547 of 1931, from a decree of Muhammad Junaid, Second Additional Subordinate Judge of Gorakhpur, dated the 21st of May, 1931, modifying a decree of M. M. Seth, Munsif of Gorakhpur, dated the 28th of January, 1929.

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RUP NARAIN SINGH v. HAR GOPAL TEWARI

Mr. *A. P. Pandey*, for the appellants.

Messrs. *Haribans Sahai* and *Sri Narain Sahai*, for the respondents.

IQBAL AHMAD and KISCH, JJ. :—This appeal arises out of a suit for sale on a mortgage, dated the 5th of September, 1924. The mortgage deed was executed by Ramnaresh Singh, defendant No. 1, and his sons Brijnandan Singh and Lahiri Singh who were arrayed as defendants Nos. 2 and 3 in the suit. Mst. Munno Kuari, the mother of Ramnaresh Singh, also joined in the execution of the mortgage deed and she was impleaded as defendant No. 4. She, however, died during the pendency of the suit and is not a party to the present appeal.

The mortgage deed was for a sum of Rs.1,551. Out of this amount a sum of Rs.857-5 was borrowed by the mortgagors for discharging a simple money decree against Ramnaresh Singh and for the payment of Government revenue. The property mortgaged originally belonged to Mst. Munno Kuari, but before the date of the mortgage Mst. Munno Kuari had transferred that property by gift to Ramnaresh Singh. Therefore the property on the date of the mortgage was owned by Ramnaresh Singh. The mortgage was in favour of the father of the plaintiffs respondents, and it is not disputed that the plaintiffs have succeeded to the rights of the mortgagee.

Rup Narain Singh, a nephew, and Lachhmi Narain Singh, a brother of Ramnaresh Singh, were also arrayed as defendants to the suit, on the allegation that they were subsequent transferees of a portion of the mortgaged property.

It is common ground that before the execution of the mortgage deed Ramnaresh Singh had been adjudicated an insolvent and was an undischarged insolvent on the date of the mortgage. It is further admitted that an order of discharge was passed on the 14th of February, 1928, and on the date of the institution of the suit giving rise to the present appeal Ramnaresh was no longer an insolvent.

The suit was not contested by the executants of the mortgage deed. Rup Narain and Lachhmi Narain contested the suit on the ground, *inter alia*, that the mortgage deed, having been executed by Ramnaresh when he was an insolvent, was void and unenforceable. They further denied the allegation of the plaintiffs that they were subsequent transferees of the mortgaged property.

The trial court held that Ramnaresh being an undischarged insolvent on the date of the mortgage "had no right to deal with the property and the hypothecation of the same was invalid". It also held that Rup Narain was not proved to be a subsequent transferee of the mortgaged property but that Lachhmi Narain was subsequent transferee of a portion of the mortgaged property. But in view of its finding that the mortgage was invalid it refused to pass a decree for sale of any portion of the mortgaged property and accordingly dismissed the claim against Rup Narain and Lachhmi Narain. It, however, passed a simple money decree against the executants of the mortgage deed, as the claim was brought within six years of the accrual of the cause of action.

The plaintiffs appealed in the lower appellate court contending that they were entitled to a decree for sale with respect to the entire amount claimed by them. At the hearing of the appeal, however, their learned counsel pressed the appeal only with respect to the sum of Rs.857-5 which was borrowed for the payment of a decree and Government revenue. The lower appellate court held that the mortgage deed was not void but only voidable at the option of the receiver or the court that had appointed the receiver in the insolvency case, and, as neither the receiver nor the court had taken exception to the mortgage deed, the mortgage was enforceable at law. It further held that both Rup Narain and Lachhmi Narain were subsequent transferees of the mortgaged property and the property in their hands was liable for the satisfaction of the plaintiffs' claim. The lower appellate court, accordingly, modified the decree of the trial court by

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granting to the plaintiffs a decree for sale with respect to Rs.857-5 with interest at the stipulated rate from the date of the bond till the period of grace fixed by the decree for sale.

Rup Narain and Lachhmi Narain have come up in second appeal to this Court and it is contended on their behalf that the mortgage deed was void and unenforceable and that the plaintiffs were not entitled to a decree for sale. In support of this contention reliance is placed on section 28(2) and (4) of the Provincial Insolvency Act by which it is provided that on the making of an order of adjudication the whole of the property of the insolvent vests in the court or the receiver, and that the property which is acquired or devolves on the insolvent after the date of the order of adjudication and before his discharge also vests in the court or the receiver. It is argued that the gift by Mst. Munno Kuari to Ramnaresh Singh did not vest the property gifted in Ramnaresh Singh and that that property vested in the receiver or the court, and, as such, Ramnaresh Singh had not a disposing power over the same. Accordingly it is urged that the mortgage was wholly void. We are unable to agree with this contention. We are of opinion, for the reasons about to be given, that an alienation by an undischarged insolvent of property belonging to him is not void but only voidable at the option of the receiver or the court and is not wholly void. It is true that the effect of an order of adjudication is to vest the property of the insolvent which belonged to him, or which he acquires while the order of adjudication is in force, in the receiver or the court, and, therefore, an insolvent is incompetent to deal with or to dispose of the property that is vested in the receiver. It is, however, quite another thing to say that an alienation by an insolvent is wholly void and cannot be enforced against him after an order of discharge has been passed and the property has been divested from the receiver and re-vested in the insolvent. Notwithstanding the order of

adjudication an insolvent is not incompetent to enter into a contract and there is no statutory provision prohibiting an insolvent from transferring his property. A reference to section 38 of the Provincial Insolvency Act makes it clear that the insolvent, even after the date of an order of adjudication, is competent to enter into composition with his creditors. In other words he can enter into a contract with his creditors. There is no statutory prohibition with respect to the transfer of the property of the insolvent. A transfer of his property by the insolvent cannot, therefore, be wholly void. It is, no doubt, voidable at the option of the receiver or the court, for the simple reason that so long as the order of adjudication is in force the property vests in the receiver or the court, and it is open to them to refuse to recognize the validity of the transfer by a person in whom, at the time of the transfer, the property did not vest. A distinction must be drawn between cases in which because of a statutory prohibition a person is incompetent to contract or to transfer his property, and cases where the person entering into a contract or transferring his property is under no such disability. In the former case the contract or the transfer would be wholly void, but in the latter class of cases it would only be voidable and not void *ab initio*. To illustrate the former class of cases reference may be made to section 37 of the Court of Wards Act (U. P. Act No. IV of 1912) and section 10(2) of the Bundelkhand Encumbered Estates Act (Act No. I of 1903). By section 37 of the Court of Wards Act it is provided that a ward shall not be competent to transfer or create any charge on, or interest in, any part of his property, or to enter into any contract which may involve him in pecuniary liability. Similarly, it is provided by section 10(2) of the Bundelkhand Encumbered Estates Act that so long as the Commissioner has not declared that the proprietor has ceased to be subject to the disabilities mentioned in the Act, the proprietor shall be incompetent to sell, mortgage or lease his proprietary rights in land or any part thereof. There are

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no analogous provisions to be found in the Provincial Insolvency Act.

The view that we take finds support from the decision in *Shiam Sarup* v. *Nand Ram* (1). We are not overlooking the fact that in the reported case the mortgage made by the insolvent was for discharging an earlier mortgage executed by him, and one of the grounds on which the learned Judges held that the mortgage was not void was that by section 16(5) of the Provincial Insolvency Act (Act No. III of 1907), which corresponds to section 28(6) of the present Insolvency Act, the remedies of a secured creditor for the realisation of his debts are not affected by the mere fact of the debtor being adjudicated an insolvent. But the learned Judges further observed in that case that it is not open to the representatives of an insolvent to assail the validity of a mortgage executed by him, if the mortgage has not been avoided by the creditor of the insolvent or the receiver appointed by the court.

It is contended by the learned counsel for the defendants appellants that as a transfer by an insolvent of the property that is vested in the receiver has the effect of defeating the provisions of the Provincial Insolvency Act, the transfer must be void. The assumption that the transfer in any way defeats the provisions of the Provincial Insolvency Act is unfounded, for the simple reason that it is open to the receiver or the court to avoid the transfer and to ignore it.

In the present case, on the date of the mortgage the property mortgaged had vested in the receiver, but before the date of suit an order of discharge was passed and on the passing of that order the mortgaged property re-vested in Ramnaresh, and therefore the mortgagee was, in view of the provisions of section 43 of the Transfer of Property Act, entitled to recover the mortgage debt by sale of the mortgaged property. Ramnaresh, on the date that he executed the mortgage,

(1) (1921) I. L. R., 43 All., 555.

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was, no doubt, not "authorized to transfer" the property mortgaged, but on the passing of the order of discharge the mortgaged property re-vested in him and the mortgagee could, therefore, enforce the mortgage by sale of the mortgaged property.

Exception is also taken to the finding of the lower appellate court that Rup Narain and Lachhmi Narain were subsequent transferees of the mortgaged property. [After discussing the evidence on this question the judgment proceeded.] We have, therefore, no hesitation in agreeing with the lower appellate court that both Rup Narain and Lachhmi Narain were subsequent transferees of the mortgaged property.

In our judgment the decree appealed against is perfectly correct and we accordingly dismiss this appeal with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Thom

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CHHANGA MAL AND OTHERS (JUDGMENT-DEBTORS) *v.* RAM DULAREY LAL (DECREE-HOLDER)*

Civil Procedure Code, order XXII, rules 8, 11, 12—*Applicability of rule* 12 *to execution appeal—Abatement of appeal—Appellant's insolvency—Refusal of receiver to give security for costs—Dismissal of appeal.*

Order XXII, rule 12 of the Civil Procedure Code does not exempt pending appeals from the operation of rule 8 of that order, even though the appeals arise out of execution proceedings. An appeal stands on quite a different footing, in this respect, from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution, then also rules 3, 4 and 8 would never apply.

So where in a pending appeal by the judgment-debtor against an order in execution the appellant became an insolvent, and the receiver refused to give the security for costs required under order XXII, rule 8(1), it was *held* that the appeal must be dismissed under rule 8(2).

*First Appeal No. 131 of 1932, from an order of Shyam Behari Lal, Subordinate Judge of Farrukhabad, dated the 18th of June, 1932.

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CHHANGA MAL v. RAM DULAREY LAL

Mr. *A. Dharam Das*, for the appellants.

Messrs. *G. S. Pathak* and *M. L. Chaturvedi*, for the respondent.

SULAIMAN, C. J., and THOM J. :—This is a judgment-debtors' appeal from an order refusing to set aside a sale during the pendency of the appeal. The appellants judgment-debtors became insolvents and a receiver was appointed of their estate. An application was made on behalf of the respondents under order XXII, rule 8 sub-rule (1), calling upon the receiver to furnish security for the costs of the appeal. The alternative prayer contained in the application is that the appeal should be dismissed.

The learned advocate for the appellants has urged that order XXII, rule 8 has no application to this case, because this is an appeal arising out of execution proceedings and is, therefore, exempted by virtue of rule 12 of that order. His contention is that if the proceedings originally were in execution, then rule 12 would apply even to appeals from orders arising out of these proceedings.

There is, no doubt, some authority in support of this contention. In the case of *Mir Khan* v. *Sharfu* (1) it was held by a learned Judge of the Lahore High Court that rules 3 and 4 of order XXII had no application to an appeal arising out of execution proceedings, by virtue of the provisions of rule 12 of that order. It appears that the majority of the Full Bench of the Patna High Court in *Hakim Syed Muhammad Taki* v. *Fateh Bahadur Singh* (2) has taken the same view. One learned Judge, however, took the contrary view.

On the other hand, there is a judgment of a Bench of the Madras High Court in the case of *Sundayee Ammal* v. *Krishnan Chetti* (3) which does not appear to have been cited before the learned Judges of the Patna High Court and in which it was held that in a

(1) (1923) 74 Indian Cases, 577. (2) (1929) I. L. R., 9 Pat., 372.
(3) (1928) I. L. R., 51 Mad., 858.

Letters Patent appeal against an order in execution of a decree the legal representative of the deceased appellant can be brought on record for proceeding with the appeal.

By virtue of the provisions in rule 11, rule 8 would apply to appeals just as much as to suits. Rule 12 provides: "Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

Fresh applications for execution, unless the principle of *res judicata* applies, can be made from time to time so long as limitation has not expired. It is, therefore, obvious why there need be no abatement of the suit in an execution proceeding. But an appeal stands on quite a different footing. Successive appeals cannot be filed, if one has already abated. It seems to us that rule 12 does not contemplate that if an appeal has been preferred from an order in execution, then also rules 3, 4 and 8 would never apply. If this were the correct view, the result would be that the death of the appellants or of the respondents would in no way result in the abatement of the appeal at all.

We are of opinion that rule 12 would not exempt pending appeals even though they arise out of execution proceedings. We think that rule 8 applies to this appeal.

There is another difficulty in the way of the appellants. Strictly speaking, the order passed by the court below was not an order passed by an execution court in the ordinary sense of the word which would amount to a decree, but it was an appealable order, which if passed by a Munsif or a Subordinate Judge would not be open to a second appeal.

With great respect to the learned Judges of the Lahore and Patna High Courts we are unable to accept their view that rules, 3, 4 and 8 cannot apply to a pending appeal of this kind.

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The receiver, as stated above, has declined to furnish security. The appeal must accordingly be dismissed with costs, which may be recovered as a debt against the estate of the original appellants.

Before Mr. Justice Thom and Mr. Justice Rachhpal Singh

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MUHAMMAD QAMAR SHAH KHAN (PLAINTIFF) *v.* MUHAMMAD SALAMAT ALI KHAN (DEFENDANT)*

Agra Tenancy Act (Local Act III of 1926), *section* 226—*Suit for profits—"Co-sharer"—Mutwalli—Whether mutwalli can maintain suit for profits—Wakf—Status of mutwalli in a private wakf.*

A certain village was wakf property, the plaintiff and the defendant being the two mutwallis, and the plaintiff's share as recorded in the khewat being one-third. In a suit for profits under the Agra Tenancy Act brought by the plaintiff against the defendant, who was the lambardar, it was objected that a mutwalli was not a "co-sharer" and could not bring such a suit.

Held that a mutwalli was a "co-sharer" within the meaning of the Agra Tenancy Act, though he might not be a person having full proprietary interest in the share held by him. For the purposes of the Act a co-sharer is a person whose name is recorded in the khewat as a co-sharer and who is jointly and severally liable with other co-sharers for the land revenue and whose revenue is payable through the lambardar under section 144 of the Land Revenue Act. Any person whose name is recorded in the khewat as holding a share in the village is entitled to maintain a suit for profits, regardless of the fact whether or not he holds it as proprietor or as manager or mutwalli.

Per curiam—In the case of a private wakf a mutwalli holding the wakf property cannot be said to be a mere manager or superintendent, but is, practically speaking, the owner, with one limitation—that he cannot make a transfer; in every other respect his position is the same as that of an owner.

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*Second Appeal No. 711 of 1930, from a decree of J. R. W. Bennett, District Judge of Pilibhit, dated the 22nd of February, 1930, confirming a decree of Abdul Majid Khan, Assistant Collector, first class, of Pilibhit dated the 29th of December, 1925.

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MUHAMMAD QAMAR SHAH KHAN v. MUHAMMAD SALAMAT ALI KHAN

Dr. *S. N. Sen* and Mr. *Mukhtar Ahmad*, for the appellant.

Sir *Tej Bahadur Sapru* and Mr. *P. N. Sapru*, for the respondent.

THOM and RACHHPAL SINGH, JJ. :—The plaintiff appellant instituted a suit in the trial court against the defendant respondent to recover a sum of Rs.1,058-9-7 on account of profits. The plaintiff alleged that village Maktul was wakf property, of which he and the defendant were mutwallis. The plaintiff's share in the wakf property was one-third. In the years in suit the defendant had acted as a lambardar and the plaintiff sued for his share in those years.

The defendant in his written statement admitted that the entire village was wakf property and that he and the plaintiff were holding it as mutwallis. He, however, raised the plea that the mutwallis were not co-sharers within the meaning of section 164 of the Agra Tenancy Act of 1901 (the suit had been instituted before the passing of the new Agra Tenancy Act) and so he (the plaintiff) could not maintain a suit for profits. This contention was accepted by the courts below. Both the courts have held that a mutwalli is not a co-sharer and cannot, therefore, maintain a suit for profits. The plaintiff has preferred this second appeal.

Section 226 of the New Agra Tenancy Act corresponds to section 164 of the old Act (Act II of 1901). Under the provisions of this section a co-sharer may sue the lambardar for settlement of accounts and for his share in profits. Section 229 (corresponding with section 166 of the old Agra Tenancy Act) lays down that the words lambardar co-sharer, muafidar, assignee of revenue, taluqdar, and superior proprietor in Chapter XIV include also the heirs, legal representatives, executors, administrators and assigns of such persons.

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The question for determination is as to whether the view taken by the courts below, namely, that a mutwalli cannot maintain a suit for profits is sound in law. In a recent case a Bench of two Judges of this Court held that for the purposes of suits for profits managers of endowed properties were to be regarded as proprietors and, therefore, could sue in rent courts as co-sharers. That was a case in which the parties were Hindus, but we are of opinion that the principle laid down in that case is applicable to the case before us.

The argument of the learned counsel for the appellant is that any person whose name is recorded in the khewat as holding a share in the village is entitled to maintain a suit for profits, regardless of the fact whether or not he holds it as proprietor or as a mutwalli. We are in agreement with this contention.

In the Full Bench ruling of *Durga Prasad* v. *Hazari Singh* (1) six out of the seven learned Judges held that in suits instituted under the provisions of chapter XI of the Agra Tenancy Act of 1901, where the plaintiff was recorded as having proprietary title entitling him to institute the suit, the revenue court could not go behind the record, receive evidence and itself try the question of proprietary title. This ruling is authority for the principle on which the appellant relies that in a case where a person is recorded in the khewat as holding a particular share in a village the entry gives him the right to institute suits as a co-sharer and it is not open to the revenue court to go into the question as to whether or not he has, standing the entry in his favour, a "proprietary right" in the share standing in his name.

Learned counsel who appeared for the respondent has contended that the word "co-sharer" means a person who has a proprietary interest in the share held by him. His argument is that when a wakf is created, the property vests in God and the mutwalli's

(1) (1911) I. L. R., 33 All., 799.

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position is that of a mere manager or superintendent. No estate vests in him and, therefore, he cannot be said to be a co-sharer. On behalf of the respondent the ruling of their Lordships of the Privy Council in *Muhammad Rustam Ali Khan* v. *Mushtaq Husain* (1) was cited. In that case, we see that their Lordships of the Privy Council made the following observations: "A receiver and manager by virtue of his appointment has no estate in the property he is called upon to control; he possesses powers over it but not an interest in it." The sole question for the determination in that case was whether an estate in the property passed to the trustees appointed under the wakfnama. The view taken by their Lordships was that no estate passed. Another ruling cited by the learned counsel for the appellant was *Narain Das Arora* v. *Haji Abdur Rahim* (2), where a Bench of two Judges of the Calcutta High Court held that a mutwalli of a wakf estate was a mere manager, and in the case of a public charitable endowment the legal ownership of the property dedicated was in the Divine Being or in the charity created in His name. These rulings, in our opinion, are authorities for the proposition only that a mutwalli holding the wakf property has no estate in it. That is to say, the property in it is not transferred to him. If the word "co-sharer" means only a person who has full proprietary interest in the share held by him, then certainly the main contention of the respondent would be sound. On a consideration of the question, however, we are of opinion that the word "co-sharer" for the purposes of the Rent Act should not be given such a narrow interpretation. It will be seen that the term "co-sharer" has nowhere been defined in the Agra Tenancy Act. In our opinion, the correct definition of a co-sharer would be a person whose name is recorded in the khewat as a co-sharer and who is jointly and severally liable with other co-sharers for

(1) (1920) I. L. R., 42 All., 609. (2) (1920) I. L. R., 47 Cal., 866.

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the land revenue and whose revenue is payable through the lambardar under section 144 of the Land Revenue Act. If a person is liable for the payment of the land revenue along with other co-sharers in the village, then he must be deemed to be a co-sharer in spite of the fact that the estate in the share may not vest in him. It has been held that a mortgagee in possession whose name is recorded as such in the khewat can sue for profits: See *Lachman Pande* v. *Tribeni Sahu* (1). According to the view taken in this case it appears that all that is necessary is to see whether or not the name of the man is recorded as co-sharer. If it is recorded, then section 201(3) of the Agra Tenancy Act, 1901, would apply. It may also be mentioned that a special manager of the court of wards is permitted to institute suits for rent and profits, though the estate does not vest in him. If the arguments of the learned counsel for the respondent were accepted many curious results would follow. Take the case of two mutwallis who hold the entire village which is wakf property. If they institute rent suits against their tenants, then it would be open to the tenants to say, if the argument of the respondent is accepted, that they cannot recover rents as they are not co-sharers in the village. Take another case: One mutwalli realizes the entire rent. When he is sued by the other it would be open to him to defeat the claim in the rent court by saying that the other is not a co-sharer as he does not own any proprietary right in the share recorded in his name. One more case: Suppose that there are several co-sharers in a village. One of them holding a share which is wakf happens to be a lambardar. Under the scheme of the Land Revenue Act the Government realizes the entire land revenue from him. The rents have been realized by other co-sharers. When he sues the co-sharers for the land revenue, then, according to the argument of the learned counsel for the respondent, it

(1) (1924) 22 A. L. J., 518.

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would be open to the other co-sharers to say that no suit would lie in the revenue court as the lambardar was holding the share standing in his name only as a mutwalli of a wakf and had no proprietary interest in the same.

The mutwallis would not be able to eject their tenants as they would be met with the plea that they (the mutwallis) were not co-sharers. In other words, the provisions of the U. P. Land Revenue Act and Agra Tenancy Act would not be applicable to those persons holding shares in wakf villages. We are not prepared to hold that this is a sound view of rent law.

In Muhammadan law there are two classes of wakf. One is public and the other is private. A public wakf is one for a public religious or charitable object. A private wakf is one for the benefit of the settlor's family and his descendants. Under the Mussalman Wakf Validating Act of 1913 a Muhammadan may settle the whole income of the endowed property for the maintenance and support of himself and his descendants from generation to generation, provided that there is an ultimate gift to charity. To hold that a mutwalli holding wakf property in a wakf of this kind is not a co-sharer for the purposes of the Rent Act would be taking a very narrow view. It is true that according to the view taken in *Muhammad Rustam Ali Khan's* case (1) and *Narain Das Arora's* case (2), the estate in the wakf property vests in God after the creation of a public wakf. But we doubt if it can be argued that in private wakfs the estate vests in God. The correct view would be to hold that the estate vests in the beneficiaries. In the case of private wakfs the mutwalli is, practically speaking, the owner, with one limitation and that is that he cannot make a transfer of the wakf property. But in every other respect his position is the same as that of an owner. A mutwalli holding a property in the case of a private wakf cannot

(1) (1920) I. L. R., 42 All., 609. (2) (1920) I. L. R., 47 Cal., 866.

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be said to be a mere manager or a superintendent. A manager holds the property during the pleasure of the proprietor. But the mutwalli in private wakfs holds the property during his life. After his death the mutwalliship will go to his legal heirs. If there are several heirs they will all be entitled to the profits of the wakf estate. The mutwalli in the case of a private wakf would not be accountable to any outsider in respect of the income of the wakf property. We are unable to accept the contention of the respondent that a mutwalli cannot be said to be a co-sharer. Nor are we prepared to accept the argument of the learned counsel for the respondent that no one who is not a proprietor can be said to be a co-sharer within the meaning of section 226 of the Agra Tenancy Act. In our opinion, any man whose name is recorded in the khewat as a co-sharer will be deemed to be such within the meaning of section 226 of the Agra Tenancy Act. For the purposes of the Agra Tenancy Act, it is not necessary for the revenue court to decide as to whether the person recorded as a co-sharer in the khewat is a proprietor or mortgagee in possession or a mutwalli. We agree with the view taken by a Bench of learned Judges of this Court in *Sahu Manhori Saran* v. *Sahu Shambhu Nath* (1) that for the purposes of suits for profits managers of endowed properties should be regarded as proprietors.

We hold that the plaintiff was entitled to maintain his suit for profits against the defendant.

For the reasons given above we allow the appeal, reverse the decrees of the courts below and remand the case to the court of first instance through the lower appellate court.

(1) S. A. No. 133 of 1930, decided on the 10th of February, 1933.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Thom.

CHHUTTAN LAL (OBJECTOR) *v.* MUHAMMAD IKRAM KHAN (DECREE-HOLDER)* 1933 *March*, 1

Civil Procedure Code, order XXI, rules 66, 69, 90—*Execution sale of revenue paying property—Material irregularity—Properties sold not in their order as entered in sale-officer's list—Hour of sale not specified in order adjourning sale—Adjournment obtained on judgment-debtor waiving a fresh proclamation—Estoppel—General Rules (Civil), volume II, Appendix* 1(*B*)(1), *rule* 2—*Undervaluation entered in proclamation of sale—Failure to object at that stage.*

In execution of a money decree two villages belonging to the judgment-debtor were attached, and were to be sold through the Collector. The decree-holder put certain valuations on these villages for entry in the proclamation of sale; and although notice under order XXI, rule 66(2) of the Civil Procedure Code was served on the judgment-debtor he did not question these valuations. The proclamation of sale mentioned the 20th of August, 1930, and 1 o'clock as the date and time fixed for the sale. Shortly before the date fixed the judgment-debtor applied for postponement of the sale, which was granted on the judgment-debtor's giving an undertaking that he waived his right to a fresh proclamation, and the court ordered that the sale be adjourned to the 24th of October, 1930; the order, however, did not specify the hour of sale. On the 24th of October, the Collector had 104 items of properties for sale under several decrees. Items 1 to 74 on the list were ancestral properties and items 75 to 104 were non-ancestral. The sale officer announced that he would sell the non-ancestral properties first; and the two villages in question, which were at serial No. 78, came to be sold at about 1 o'clock. The judgment-debtor applied under order XXI, rule 90 for setting aside the sale on the ground of material irregularity, and consequent loss, on the following counts, among others, (1) that his two villages were sold out of turn and not in the order in which properties for sale were entered in the list, (2) that the order postponing the sale did not specify the hour of sale, (3) that the value of the property

*First Appeal No. 151 of 1931, from an order of Piyare Lal Govil, Subordinate Judge of Muzaffarnagar, dated the 30th of July, 1931.

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as shown in the sale proclamation was grossly low, which misled the intending purchasers and resulted in the villages being sold for a very inadequate price.

Held (1) In the absence of any rule fixing the order in which different properties ordered to be sold by different courts on the same day are to be sold, or any rule requiring that sales of properties should take place in the exact order in which they are entered in the list by the sale officer, there was no material irregularity in the sale officer's having taken up for sale the non-ancestral properties first. The sale officer's list of course contains all the sales which have been ordered to take place on that date, but there is no representation made that they would take place in the exact order in which they are entered in the list.

(2) Order XXI, rule 69 no doubt prescribes that the order adjourning a sale should specify not only the date but also the hour to which the sale is adjourned. In cases where properties other than landed properties are to be sold and sales take place on the spot, the specification of the exact hour is most important and an omission may be a serious irregularity, because it would not be possible for the purchasers to attend unless the time has been announced previously. But as regards landed properties, General Rules (Civil), volume II, Appendix 1(B)(1), rule 2 lays down that the sale shall commence at noon at all seasons in all districts. There was, therefore, a definite rule in existence which laid down at what time the sale was to commence, and intending purchasers presumably knew the usual hour. Further, apart from this, the failure to mention the hour in the order, although it might be an irregularity, ceased to be a material irregularity when the judgment-debtor agreed that no proclamation or notice of the adjourned sale was to be issued.

(3) Undervaluation of the property in the proclamation of sale is, no doubt, a material and serious irregularity; but notice under order XXI, rule 66(2) was served on the judgment-debtor and any objection as to price should have been raised by him before the sale proclamation was drawn up. Not having raised any such objection he must be deemed to have waived it, and was estopped, upon general principles and particularly by the added proviso (*b*) to rule 90, from now raising the same ground and urging that the undervaluations were a material irregularity in the publication of the sale. Further, having chosen to waive his right to the issue of a fresh proclamation, he must be deemed to have waived his

objection to the alleged irregularity of undervaluation in the previous sale proclamation. He could prove the real value in order to establish substantial loss, but not in order to establish material irregularity.

Babu Ram v. *Iman-ullah* (1), *Rup Kishore* v. *Collector of Etah* (2), and *Gulab Singh* v. *Raghubir Saran* (3), distinguished.

Dr. *K. N. Katju* and Mr. *B. L. Dave*, for the appellant.

Messrs. *Mukhtar Ahmad* and *N. A. Sherwani*, for the respondent.

SULAIMAN, C. J., and THOM, J. :—This is a judgment-debtor's appeal from an order refusing to set aside an auction sale. The judgment-debtor alleged material irregularities and fraud in publishing and conducting the sale and substantial injury in consequence.

It appears that a simple money decree dated the 16th of July, 1929, had been in execution for some time. Landed properties belonging to the judgment-debtor were attached and execution was sought against them. It is not necessary to go back earlier than August, 1930. The 20th of August was fixed for the sale of the properties. The properties being revenue-paying lands, the sale had to be conducted by the Collector. The order passed by the Subordinate Judge fixing the date, as noted in the order sheet, did not specify the hour at which the sale would take place, but the sale proclamation which was issued mentioned the date as well as 1 o'clock as the hour at which the sale was to take place. It may also be noted that the incumbrances were not specified in the sale proclamation but were specified in the order (*rubkar*) of the court accompanying it when it was sent to the sale officer.

(1) (1926) I. L. R., 49 All., 402. (2) (1929) I. L. R., 52 All., 115
(3) [1932] A. L. J., 357.

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On the 16th of August, shortly before the date fixed, the judgment-debtor applied to the court for the postponement of the sale. This application came up for disposal on the 20th, and he made a statement that the sale should be postponed and the 24th of October, 1930, be fixed for the sale, and that it should take place on that day without the issue of a fresh proclamation of sale. On this statement the court postponed the sale and fixed the 24th of October for the next sale. As the judgment-debtor had agreed that there should be no fresh proclamation of sale issued, none was issued.

On the 24th of October, 1930, the Collector had about 104 items of properties for sale. These were grouped together under two different headings, "Ancestral" and "Non-ancestral." In order to clear up this point the counsel for the parties agreed that the list of sale which was before the sale officer on that day should be sent for. That register has come and we have looked into it with the consent of the counsel for both the parties. Items 1 to 74 were ancestral properties and items 75 to 104 were non-ancestral properties. Rai Bahadur Babu Jagannath Prasad has stated that the sale officer announced at the beginning of the sale that he would sell the non-ancestral properties first, and the ancestral properties the next day. The judgment-debtor's properties, which were at serial No. 78, were put to auction at about 1 o'clock. Village Phulat was sold for Rs.5,500 and village Muhammadpur for Rs.1,543.

The judgment-debtor did not deposit the amount of the decree, which was about Rs.7,000, within 30 days and did not apply to have the sale set aside under order XXI, rule 89, but preferred to have it set aside on the ground of irregularity and fraud under rule 90.

Various objections were urged in the court below, but, as the order of the learned Subordinate Judge shows, the following points were pressed before him: (1) The decree-holder won over some official of the sale officer's office and got the property sold first; (2) the

sale proclamation did not mention the incumbrances over the property; (3) the court, when postponing the sale, did not specify the exact hour at which the sale should be held; * * * (5) that the estimates of the value of the properties mentioned in the sale proclamation were grossly low which misled the intending purchasers; (6) that the actual value of the property was over Rs.1,00,000.

(1) On the first point the learned Subordinate Judge has held that there is no rule which requires that sales of properties should take place in the exact order in which they are entered in the list by the sale officer, and that accordingly there was no breach of any rule which amounted to a material irregularity. He relied on the case of *Inam-ullah Khan* v. *Shambhu Dayal* (1). At page 63 in that case it was observed: "According to the sale officer's report his practice always has been to sell first the non-ancestral properties before proceeding to sell the ancestral properties. In the absence of any rule requiring him to follow the order strictly, it cannot be said that there has been any material irregularity within the meaning of rule 90." We think that the view taken by the court below is correct.

The register or the list maintained by the sale officer, of course, contains all the sales which have been ordered to take place by different courts on that date, but there is no representation made that they would take place in the exact order in which they are entered in the register. Furthermore, as in the reported case so in the present case the sale officer took up the sale of the non-ancestral properties in the first instance. That is the explanation why the sale of item No. 78 came up at about 1 o'clock. We are unable to hold that this circumstance amounted to such a material irregularity as to vitiate the sale. There are rules regulating the order of sales of various lots when ordered to be sold in execution of one decree. There are also rules regulating the order of

(1) [1931] A. L. J., 62.

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sales when the same property has been ordered to be sold by different courts. But our attention has not been drawn to any rule which fixes the exact order in which different properties ordered to be sold by different courts should be sold. We, therefore, see no serious objection to the sale officer having taken up the non-ancestral properties for sale in the first instance. As a matter of fact, when he had 104 items of properties to sell, he could not have sold all those properties at the exact hour at which sales were announced in advance to commence.

There was also hardly any evidence to show that the decree-holder had won over any official of the sale officer's office. The finding of the court below is against the judgment-debtor, and the learned counsel for the judgment-debtor has also not pressed this point before us.

(2) On the second point the contention of the judgment-debtor is that there was a non-compliance with the provisions of order XXI, rule 66, inasmuch as the incumbrances on the properties were not specified in the sale proclamation. As pointed out above, the original sale proclamation did not contain these specifications, but the rubkar which accompanied it did contain the specifications. An omission to mention the incumbrances in the sale proclamation would not by itself be injurious to the judgment-debtor, because it would be likely to persuade the auction purchasers to offer a higher price. It is, however, suggested that the fact that the incumbrances were noted in the accompanying rubkar and not in the sale proclamation might cause a sudden surprise to the purchasers. But the rubkar had been sent along with the sale proclamation. Whatever irregularity there was committed at the time of the issue of the previous sale proclamation, that irregularity was distinctly waived by the judgment-debtor when he agreed that the previous proclamation of sale should suffice and that there should be no further proclamation.

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of sale. It seems to us that in view of his agreement it is no longer open to him to say that the sale, which took place without any fresh proclamation, is vitiated because there was some irregularity in the sale proclamation issued on the previous occasion.

In the case of *Girdhari Singh* v. *Hurdeo Narain* (1) the judgment-debtor had obtained a postponement of the sale for one month, "the attachment and the notification of sale being maintained" (page 240); the court accordingly ordered the postponement of the sale "without the issue of a second notification of sale." Their Lordships of the Privy Council held that the judgment-debtor could not properly take objection to that notification by stating that there was an error in it, and that there was an admission on his part that the notification was correct, or that, at any rate, there was no such mistake or irregularity as would be likely to mislead intending purchasers which could have caused substantial loss to the judgment-debtor, the property being sold at an inadequate price.

We, therefore, hold that there was no irregularity, which can be considered to be material within the meaning of order XXI, rule 90, which would vitiate the sale.

(3) As regards the third point, there is no doubt that order XXI, rule 69 prescribes that the court may, at its discretion, adjourn any sale to a specified day or hour. It is, therefore, the duty of a court to specify not only the day but also the hour to which a sale is adjourned. As noted above, no hour was specified in the order fixing the 20th of August, 1930, for sale, nor had any hour been specified in the order fixing the 24th of October, 1930, for the sale. In cases where properties other than landed properties are to be sold and sales take place on the spot, the specification of the exact hour is most important and an omission may be a serious irregularity, because it would not be possible for the purchasers to

(1) (1876) 3 I. A., 230.

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attend unless the time has been announced previously. But as regards landed properties, General Rules (Civil), volume II, page 3, appendix 1(B)(1), rule 2, lays down that "the sale shall commence at noon at all seasons in all districts." This may be an explanation why there was an omission of the exact hour in the two orders passed by the Subordinate Judge. As noted above, the hour was put down by the office in the proclamation of sale which was issued on the first occasion, but there being no fresh proclamation of sale on the second occasion, no hour was announced again.

The learned advocate for the judgment-debtor has relied on the cases of *Babu Ram* v. *Iman-ullah* (1), *Rup Kishore* v. *Collector of Etah* (2), and *Abdul Rauf Khan* v. *Qamrunnissa* (3) in support of the proposition that the omission to specify the hour is a material irregularity. In *Babu Ram's* case the properties to be sold were shops and buildings, and the sale was not made by the Collector. Similarly, in *Rup Kishore's* case the sale was not of revenue-paying properties and was held by the Amin. In *Abdul Rauf Khan's* case also the property sold was a house and the sale was not held by the Collector. The matter came up to the High Court in revision and the Bench declined to interfere, holding *inter alia* that it was open to the court below to find that there had been a material irregularity owing to the non-specification of the day and the hour.

The learned advocate for the judgment-debtor has also relied on the case of *Gulab Singh* v. *Raghubir Saran* (4). No doubt that was a case of the sale of zamindari property, but it appears that there the sale was adjourned not by an order of the court but by the sale officer himself without specifying the hour at which the sale would take place the next day. Coupled with other matters the Bench held that there had been a material irregularity. There was no question of a waiver on the part

(1) (1926) I. L. R., 49 All., 402.
(2) (1929) I. L. R., 52 All., 115.
(3) [1930] A. L. J., 1062.
(4) [1932] A. L. J., 357.

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of the judgment-debtor in that case and it can, therefore, be easily distinguished.

The main question before us is whether, although the omission to specify the hour may be an irregularity, it is a material irregularity when the judgment-debtor has agreed that there should be no proclamation of sale at all. Apart from the question that there is a definite rule in existence which lays down at what time the sale is to commence, and that, therefore, the intending purchasers presumably know the usual hour, the failure to mention the exact hour in the order ceases to be a material irregularity when it is agreed that no proclamation or notice of the sale would be issued. When there was to be no fresh announcement, it is very difficult to hold that the sale is vitiated because in the order directing adjournment the court had omitted to mention the exact hour at which the sale should take place on the next day, the omission being presumably due to the fact that there was a rule in existence which fixed the time. If the judgment-debtor had felt any doubt as to the time at which the sale would take place, it was open to him to apply to the court to specify the hour so that he may himself take steps to notify not only the date but also the hour. But as remarked above, he agreed that there should be no proclamation of sale at all for the adjourned date. Indeed, it was on this express understanding that the sale was postponed. In these circumstances we are unable to hold that there has been a material irregularity in consequence of an omission in the order of the court specifying the exact hour when the adjourned sale was to take place.

* * * * *

[The judgment then proceeded to consider the evidence as to an allegation of fraud or misrepresentation having been committed by the decree-holder, and came to the conclusion that the allegation was not proved.]

(5) and (6) The learned Subordinate Judge has come to the conclusion that the property sold appears to be worth Rs.40,000. * * * * We do not think that it

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is necessary for us to go into the question of the actual value of the property, and we are prepared to assume in favour of the judgment-debtor that the properties sold were worth Rs.40,000.

The under-valuation in the original proclamation of sale would then, no doubt, be very gross and would have been misleading to the auction purchasers. Their Lordships of the Privy Council in the case of *Saadatmand Khan* v. *Phul Kuar* (1) considered that an under-valuation is something more than common irregularity, for it is a mis-statement of the value of the property which is so glaring in amount as could hardly have been made in good faith and was calculated to mislead possible bidders and to prevent them from offering adequate prices (page 417). No doubt that was a case which arose under section 287 of the old Code of Civil Procedure which did not actually provide for the issue of a notice to the judgment-debtor before the proclamation of sale was drawn up, as order XXI, rule 66 provides. But the remark made by their Lordships is equally applicable. We would have been inclined to hold that the under-estimate was a material and serious irregularity which was the cause of the property being sold for a small amount, if no question of estoppel had arisen.

It, however, appears that when the decree-holder first applied for execution he wanted three villages to be attached, namely the two present villages in dispute, Phulat and Muhammadpur, as well as a third village, Ajitpur. The application was filed on the 19th of December, 1929, and in it the decree-holder alleged that Phulat was worth Rs.4,000, Muhammadpur was worth Rs.1,000 and Ajitpur was worth Rs.4,000. Notice was issued to the judgment-debtor to show cause before the settlement of the price for the proclamation of sale. This notice was served on him personally. He appeared and filed an objection on the 12th of February, 1930, in which it was alleged that village Ajitpur was worth Rs.25,000 and had been grossly under-valued.

(1) (1898) I. L. R., 20 All., 412.

It was further pleaded that Ajitpur was an ancestral village and should not be sold by the civil court direct. In this objection the judgment-debtor, for some unknown reason, did not object that the value of the villages Phulat and Muhammadpur had been under-estimated. The omission was all the more surprising, because according to him village Phulat was really worth Rs.1,00,000. It is, therefore, startling that although he took objection to the under-valuation at Rs.4,000 of village Ajitpur said to be worth Rs.25,000, he did not think it fit to raise objection to the under-valuation at the same figure of village Phulat which, according to him, was worth Rs.1,00,000. The only explanation suggested on behalf of the judgment-debtor before us is that at that time he was concerned mainly with the exemption of village Ajitpur from sale by the civil court direct, on the ground that it was an ancestral property. The fact, however, remains that the judgment-debtor had notice that the decree-holder had filed an affidavit in support of the application alleging that the villages Phulat and Muhammadpur were worth Rs.4,000 and Rs.1,000 only, and although he appeared in court to file objections with regard to the third property, he took no steps to object to these under-valuations.

Apart from any general rule of estoppel as was relied upon in the case of *Mohan Lal* v. *Kali Charan* (1), there is the fact that this High Court has made the following addition to the proviso to order XXI, rule 90: "No such application shall be entertained upon any ground which could have been taken by the applicant at or before the date on which the sale proclamation was drawn up." This amendment was made long before 1929. It seems quite clear to us that in view of this express addition, it is no longer open to the judgment-debtor to urge that the under-valuations amounted to a material irregularity within the meaning of that rule. Notice was expressly issued to the judgment-debtor under order XXI, rule 66, to appear and show cause. He had full

(1) (1927) I. L. R., 49 All., 783.

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opportunity of pointing out this mistake to the court at the time. He refrained from doing it or omitted to do so. This ground should have been raised by him before the sale proclamation was actually drawn up. Not having raised any such ground he must be deemed to have waived it. He must, therefore, be estopped from now raising the same ground and urging that the under-valuations were a material irregularity in the publication of the sale. The whole object of the amendment is that judgment-debtors should not sit idle and refrain from pointing out mistakes in the sale proclamation when they are given an opportunity to do so, and then after the sale has taken place, raise an objection in order to get that sale set aside. We think that in view of the express provision in this amendment it is no longer open to the judgment-debtor to make the under-valuations a ground of material irregularity. This was the view expressed by a Bench of this Court in the case of *Abdul Rauf Khan* v. *Qamrunnissa* (1). The judgment-debtor is not estopped from showing that the actual value of the property was much more than what was announced in the original proclamation of sale, in order to show that he has suffered substantial loss, but it would be incumbent upon him to show that this substantial loss was the consequence of some other material irregularity. He cannot be allowed to treat the under-valuation itself as a material irregularity when he failed to object at the time when he appeared on the former occasion. We are, therefore, compelled to overrule this objection.

A further point against the judgment-debtor is that this alleged irregularity was committed when the previous sale proclamation was issued. He chose to waive his right for the issue of a fresh proclamation and agreed that no such fresh proclamation should be issued. Having done so, he must be deemed to have waived his objection to the irregularity in the previous sale proclamation. When no fresh proclamation was issued, he

(1) [1930] A. L. J., 1062.

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cannot be allowed to get the sale vitiated on the ground that, although no sale proclamation was issued at this time, there had been an irregularity in the preparation of the previous sale proclamation owing to the under-valuations.

* * * * *

Holding that the judgment-debtor is now estopped from urging that the under-valuations in the previous sale proclamation were a material irregularity, we are unable to hold that there has been any other material irregularity which has caused the property to be sold at an inadequate value. The mere fact that the price fetched was grossly low is not in itself sufficient to vitiate the sale. If the judgment-debtor has suffered, it is due to his own negligence and omission in not raising this point when he received notice under order XXI, rule 66, and to his obtaining an adjournment by agreeing to the sale taking place on the 24th of October without the issue of a fresh proclamation. The appeal is accordingly dismissed with costs.

MISCELLANEOUS CIVIL

Before Mr. Justice King

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March, 2

HALIMAN AND ANOTHER (DEFENDANTS) *v.* MEDIA AND ANOTHER (PLAINTIFFS)*

Court Fees Act (VII of 1870), section 7(v)(b) and (d)—Suit for possession of fractional shares of khewat khatas—"Estate"—Separate engagement for Government revenue—Court fee payable on market value—Government of India Notification No. 1746, under section 35 of Court Fees Act.

A suit for possession of fractional shares of certain khewat holdings (khatas) of zamindari land is governed by section 7(v) (*d*), and not section 7(v)(*b*), of the Court Fees Act and the court fee payable is according to the market value of the fractional shares.

Although each khewat khata is, in accordance with section 67A of the Land Revenue Act and Board's Circular I-1, entered in the revenue records as being separately assessed with

*Stamp Reference in First Appeal No. 336 of 1929.

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a definite portion of the revenue assessed upon the mahal, nevertheless it cannot be held to be an "estate" within the meaning of the Explanation to section 7(v) of the Court Fees Act, because no separate engagement has been entered into between Government and the proprietors in respect of the revenue assessed upon the khewat khata. And as the proprietors of the mahal have executed an engagement for the revenue assessed upon the mahal, of which the khewat khata is a part, it cannot be held that the khewat khata has been separately assessed with revenue "in the absence of such engagement".

Further, a khewat khata is not a "definite share" of an estate, within the meaning of section 7(v)(*b*), as it is not a "definite share" of the mahal; it follows that a fractional share of a khewat khata is not a "definite share" of an estate.

Under the Government of India Notification No. 1746, dated the 4th of April, 1889, issued in exercise of the powers conferred by section 35 of the Court Fees Act, the court fee in the present case would rightly have been calculated, under section 7(v)(*b*), upon five times the proportionate amount of revenue. But after the Devolution Act of 1920 the Notification in question has been superseded by the Local Government and is no longer in force.

A khewat khata is, no doubt, a "part of an estate" and it is recorded as separately assessed with revenue. So, in a suit for possession of an entire khewat khata the court fee would be payable under section 7(v)(*b*), upon five times the revenue assessed upon the khata.

Dr. *N. U. A. Siddiqui*, for the appellants.

Mr. *Muhammad Ismail* (Government Advocate), for the Crown.

KING, J. :—This is a reference under section 5 of the Court Fees Act.

The suit was for possession of fractional shares of certain khewat holdings (khatas) of zamindari land. The question is whether under section 7(v)(*b*) of the Court Fees Act the value of the subject-matter should be deemed to be five times the proportionate share of the Government revenue assessed upon the khewat khatas, or whether it should be the market value of the land in suit, under

section 7(v)(*d*) of the Act. Under section 7(v)(*b*), where the suit is for possession of land, and where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate, and is recorded in the Collector's register as separately assessed with such revenue and such revenue is settled, but not permanently, then the value of the subject-matter shall be deemed to be five times the revenue so payable.

It is argued for the appellant that the land in suit forms definite shares of an estate, which are recorded in the Collector's register as separately assessed with revenue, and, therefore, the value should be deemed to be five times the proportionate share of the revenue payable upon the fractional shares claimed. The decision depends upon the meaning of the word "estate" in this clause. The word "estate" has been defined in the "Explanation" as follows: "The word 'estate', as used in this paragraph, means any land subject to the payment of revenue, for which the proprietor or farmer or raiyat shall have executed a separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue."

A perusal of the United Provinces Land Revenue Act, 1901, and of the rules contained in Board's Circular I-1, establishes the facts that the unit of land for the purpose of the assessment of revenue is a mahal, and that a separate engagement is demanded from the lambardars or proprietors of every mahal in respect of the revenue assessed upon the mahal. It is true that the khewat khatas in question are entered in the revenue records as being separately assessed with revenue, that is, a certain amount of revenue is recorded as being payable in respect of each khewat khata. Nevertheless, I think that a khewat khata cannot be held to be an "estate" within the meaning of this clause for the reason that *no separate engagement* has been executed in respect of each khewat khata. It appears that the settlement officer distributes the

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revenue assessed on each mahal over the several properties recorded separately in the khewat, in accordance with the provisions of section 67A of the U. P. Land Revenue Act. This section was only inserted in the Act by an amending Act of the year 1929, but the practice of distributing the assessment of the mahal over its component parts (thoks, pattis, or khewat khatas) had previously been in force under the authority of rules contained in Board's Circular I-1. I think it is clear that although each khewat khata is recorded as separately assessed with revenue, nevertheless it cannot be held to be an "estate" within the meaning of the clause, because no separate engagement has been entered into between Government and the proprietors in respect of the revenue assessed upon the khewat khata.

It cannot be held that the khewat khata has been separately assessed with revenue "in the absence of such engagement", because the proprietors of the mahal must have executed an engagement for the revenue assessed upon the mahal; and the khewat khata is a part of the mahal. I think it is established, therefore, that a khewat khata is not an "estate" within the meaning of section 7(v).

Further, I think it is clear that a khewat khata is not a "definite share" of an estate, as it is not a "definite share" of the mahal. It is merely a part of the mahal, but not a fractional share or definite share of the mahal, although it is assessed with a definite share of the revenue assessed upon the mahal. It follows that a fractional share of a khewat khata is not a "definite share" of an estate.

A khewat khata is, no doubt, a *part* of an estate and it is recorded as separately assessed with revenue. So if the suit were for the possession of an *entire* khewat khata the court fee would be payable *ad valorem* under section 7(v)(*b*) upon five times the revenue assessed upon the khata. But in the present case the suit is for fractional

shares of khewat khatas. Those fractional shares are not recorded as separately assessed with revenue. The conclusion seems inevitable that section 7(v)(*b*) does not apply to the facts of this case. On the other hand, section 7(v)(*d*) seems clearly applicable. The fractional shares of khewat khatas are parts of an estate (mahal), but are not "definite shares" of the estate and are not recorded as separately assessed with revenue. Therefore under section 7(v)(*d*) the court fee is payable on the market value of the fractional shares.

It is conceded that the practice hitherto has been to treat the khewat khata as an "estate", on the ground that it is recorded in the Collector's register as being separately assessed with revenue and that, therefore, if a fractional share of the khewat is in suit, the court fee is treated as payable under section 7(v)(*b*) on five times the proportionate amount of revenue. According to the Chief Inspector of Stamps, this practice is not sanctioned by the Act itself but is based upon the authority of an old Government of India notification, viz. Notification No. 1746, dated the 4th of April, 1889, under which the Government of India, in exercise of the powers conferred by section 35 of the Court Fees Act, 1870, were pleased to direct that "When a part of an estate paying annual revenue to Government under a settlement which is not permanent, is recorded in the Collector's register as separately assessed with such revenue, the value of the subject-matter of a suit for the possession of, or to enforce a right of pre-emption in respect of, *a fractional share of that part shall*, for the purpose of computation of the amount of the fee chargeable in the suit, be deemed not to exceed five times such portion of the revenue separately assessed on that part as may be rateably payable in respect of the share." On the strength of this Notification the court fee would be computed in the present case on the revenue payable in proportion to the fractional shares.

The argument on behalf of the Crown is that in the absence of such Notification the court fee would be payable

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in this case not on five times the proportionate share of revenue but on the market value, under section 7(v)(*d*). It is argued with some force that if section 7(v)(*b*) were applicable to cases of this sort then there would have been no necessity for issuing the notification. I have already given reasons for holding that section 7(v)(*b*) does not apply to this case, and certain rulings have been cited in support of this conclusion. In *Haidar Ali* v. *Sondha* (1) it was held that in a suit for a half share of a holding, not a definite share in an estate paying annual revenue to Government, the stamp must be calculated upon the value of the land under section 7(v)(*d*) and not on the revenue under clause (v)(*b*), there being no provision in the Court Fees Act for the value of a fractional part of a holding, which is recorded in the Collector's register as separately assessed with land revenue, being calculated on the land revenue. The reason for the decision seems to have been that although the holding was recorded in the Collector's register as separately assessed with land revenue, it was, nevertheless, not an "estate" within the meaning of the clause and, therefore, section 7(v)(*b*) was not applicable. This ruling was followed in *Mst. Jian* v. *Mst. Nadir Nishan* (2). It may be that it was in view of these rulings that the Government of India Notification of 1889 was issued. However that may be, it seems clear that under this Government of India Notification the court fee in the present case would rightly have been calculated upon five times the proportionate amount of revenue. The Chief Inspector of Stamps points out that in the United Provinces the Notification of 1889 is no longer in force. Under the Devolution Act of 1920, the Local Government were given authority to issue notifications under section 35 of the Court Fees Act in respect of the territories under their administration. The power to issue notifications must include the power to cancel notifications previously issued. The Local Government of the United Provinces did, in fact, issue a notification

(1) [1880] Punj. Rec., No. 102. (2) [1883] Punj. Rec., No. 6.

No. 1231, dated the 11th of October, 1923, under section 35 of the Court Fees Act as amended by the Devolution Act. In this Notification they gave a list of cases in which the Governor in Council had been pleased to make certain reductions and remissions in court fees and it was expressly stated that this Notification was issued *in supersession of all previous notifications* under that section. The United Provinces Notification did not include any remission or reduction corresponding to that made by the Government of India Notification of 1889. Whether this omission was intentional or due to an oversight is immaterial from my point of view. The fact remains that the Government of the United Provinces cancelled the Notification of 1889 under which the court fee, in a case of this sort, could be computed on five times the proportionate revenue. The result is that we must now follow strictly the provisions of the Act itself and, for reasons given above, I hold that section 7(v)(*b*) is not applicable to the facts of this case and the court fee must be paid upon the market value of the property under section 7(v)(*d*).

Certain rulings of this High Court have been referred to on behalf of the appellant, but I do not think that any of them support his argument. In *Reference under the Court Fees Act* (1) it was held that the court fee in respect of separate plots of land which did not constitute any definite fraction of a distinct revenue-paying area, and were not themselves separately assessed to revenue, should be paid on the market value of the land and not, as is the case where the suit is for a definite fractional share, on five times the Government revenue. The ruling relates to separate plots of land and the decision is that the court fee is payable on the market value of the land, so *prima facie* it has no bearing on the present case, but the learned advocate for the appellant has relied upon certain observations made by the Taxing Officer which were endorsed by the Taxing Judge. In my opinion the

(1) (1894) I. L. R., 16 All., 493.

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observations made do not help the appellant, because they are based upon the Government of India Notification of 1889 which has now been cancelled. There seems to be no ruling of this Court which is directly in point and it seems unnecessary to refer to any cases which were decided before the cancellation of the Government of India Notification of 1889.

Under the present law it appears that certain anomalies will arise. The court fee in a suit for possession of an entire khewat khata would probably be less than in a suit for possession of half the khata. If the contention for the Crown is accepted as correct, as I think it must be, then the result is that these anomalies must be accepted and the present practice must be altered, unless the Local Government think fit to issue a notification under section 35 of the Court Fees Act on the lines of the Government of India Notification of 1889.

In my opinion section 7(v)(*b*) is not applicable and there is no notification under section 35 to be taken into account, so section 7(v)(*d*) applies and the court fee must be paid on the market value of the property in suit. I allow three months to the parties for making good the deficiency in court fees.

REVISIONAL CRIMINAL

Before Mr. Justice Bajpai

EMPEROR *v.* ASA RAM*

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March, 2

Municipalities Act (Local Act II of 1916), sections 241, 298 heading F(a), (b) and (d)—Bye-law requiring licence for sale of milk, dahi *etc.*—Ultra vires—*Power to establish, regulate and inspect markets etc. does not include power to impose and levy licences.*

A bye-law framed by a Municipal Board prohibiting a shopkeeper from selling milk and *dahi* etc. without previously obtaining a licence from the Board is *ultra vires.*

*Criminal Reference No. 828 of 1932.

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Under section 298, clause (2), heading F(*d*) the Board has the power to provide for the establishment, regulation and inspection of markets, etc., and of places for the manufacture, preparation or sale of specified articles of food or drink, but this sub-clause does not speak of requiring or levying licences; and it would be doing violence to the language to hold that a power to make bye-laws for the above-mentioned purposes includes a power to make bye-laws requiring licences and levying fees for the sale of specified articles of food or drink. The power to make bye-laws regarding granting of licences is contained in section 241 and in sub-clauses (*a*) and (*b*) of heading F of section 298, but that is confined to the sale of meat, fish, fruits and vegetables and does not apply to the sale of any other articles of food or drink.

Messrs. *S. K. Dar* and *S. N. Seth*, for the applicant.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

BAJPAI, J. :—By this reference the learned Sessions Judge of Fatehpur recommends that the conviction of the applicant under section 299(1) of the Municipalities Act, Local Act II of 1916, be set aside. The recommendation is opposed by the Municipal Board of Fatehpur. The facts are that the applicant is a shopkeeper having his shop within the municipal limits of Fatehpur, and the charge against him is that he was selling milk and *dahi* without having obtained previously a licence from the Municipal Board. The bye-law which he is said to have infringed is to the effect that "No person shall sell or expose for sale milk, cream, *rabri*, *dahi*, butter, or ghee within the limits of the municipality unless he has been granted a licence in this behalf on payment in advance of an annual fee of Rs.2 for such licence, whether it is of the whole year or for a part thereof." The courts below have held that there is sufficient evidence on the record to show that the applicant was selling milk or *dahi* at his shop within the municipal limits and it is admitted that he had not taken a licence.

It is, however, contended that the bye-law in question was *ultra vires*. The Municipal Board purports to have

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framed the bye-law under a power given to it by section 298, clause (2), heading F(*d*) of the Municipalities Act. Under clause (1) of that section a Board can make bye-laws consistent with the Act, and it is argued that looking at the scheme of the Act the legislature intended that the Municipal Board should not levy any licence for the sale of articles like milk and *dahi*. Under section 130 of the Municipalities Act of 1900 the Board had the power by rules to prohibit the sale of *any specified articles of food or drink* except in accordance with the conditions of a licence granted by the Board, and it is clear, therefore, that under the old Act the Municipal Board could levy licence on articles like milk and *dahi*. The power to levy a licence was, therefore, given by the Act itself and not by means of any bye-law framed under the bye-law making power of the Board. Under section 241 of the present Act, it has been laid down that the right of any person to use any place as *a market or shop* for the sale of animals, meat or fish intended or human food, or as a *market* for the sale of fruit or vegetables shall be subject to bye-laws made under heading F of section 298. It would thus appear that the wide powers conferred by section 130 of the Act of 1900 to control and regulate places for the sale of articles of food and drink have been considerably curtailed in this section and section 298F. There is, therefore, some force in the argument advanced on behalf of the applicant that the bye-law in question is not in keeping with the spirit of the Act. Coming to section 298(2), heading F(*d*), it seems that the Board has the power to provide for the establishment and for the regulation and inspection of markets and slaughter houses, etc., etc., of places for the manufacture, preparation or sale of specified articles of food or drink, and the contention of the Board is that they have framed a bye-law for the levying of the licence for the sale of milk and *dahi* etc., under this power. This particular sub-clause does not either speak of prohibition or of levying of a licence. The power to make rules regarding prohibition

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and the granting of licences is contained in section 298(2), heading F(*a*) and (*b*), and that is confined to the sale of animals intended for human food, meat, fish, fruit and vegetables. It would be doing violence to the language to hold that when a Board attempts to make a bye-law for the establishment, and for regulation and inspection, of places for the sale of specified articles of food or drink, the Board has the power to make a bye-law for the levying of licence on specified articles of food or drink. They can provide for the establishment, for the regulation and for the inspection, of places for the manufacture or sale of specified articles of food, but they cannot under the dubious expression "regulate places" charge a fee for licence. "A statutory power conferred upon a Municipal Council to make bye-laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorise the making it unlawful to carry on a lawful trade in a lawful manner." This was held by their Lordships of the Privy Council in *Municipal Corporation of Toronto* v. *Virgo* (1). The Board has the power under section 294 of the Municipalities Act to charge a fee to be fixed by a bye-law for any licence, sanction or permission which it is entitled or required to grant by or under this Act, but as I have indicated above, the change in the present enactment shows that they are empowered to require licences to be taken out only for *markets* used for the sale of animals, meat, fish, fruit, or vegetables, and that as regards *shops* the Boards are empowered to require licences to be taken out only in the case of shops used for the sale of animals, meat or fish. They are not empowered to demand a licence in the case of a shop used for the sale of milk, *dahi*, cream, etc. I, therefore, accept the recommendation of the learned Sessions Judge, set aside the conviction of the applicant and direct that the fine, if paid, be refunded.

(1) [1896] A. C., 88.

APPELLATE CIVIL

Before Mr. Justice King and Mr. Justice Niamat-ullah

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March, 2

UPENDRA NATH BASU (DEFENDANT) *v.* HET LAL (PLAINTIFF)*

Civil Procedure Code, schedule II, paragraph 20—Application for filing an award—Venue—"Court having jurisdiction over the subject-matter of the award"—Territorial jurisdiction.

In order to decide whether the court, to which an application for filing an award under paragraph 20 of the second schedule of the Civil Procedure Code is made, has jurisdiction over the subject-matter of the award, it is necessary to consider the reliefs granted by the award and to determine whether the court would have jurisdiction to try a regular suit between the parties in which the reliefs claimed were the reliefs granted by the award.

It was agreed between a debtor and a creditor that the creditor should have a half share in a certain zamindari property of the debtor in lieu of his loan; but no conveyance was executed, and the debtor continued in possession of the entire property, paying a half share of the profits to the creditor. Disputes subsequently arose and were referred to arbitrators, the matters to be decided being (1) the question of accounts and (2) the question of transfer of the property. The award decided that the debtor was to pay a certain sum to the creditor to buy out the latter's half share, and until such payment was made the latter would remain owner of that share. An application to file the award was made in the court of the Subordinate Judge of Benares; the parties were residents of Benares, but the property was situate in Patna. *Held* that the court was not a court having jurisdiction over the subject-matter of the award. The award dealt with two points, one being the sum of money due in respect of the profits and the other relating to the transfer of the property. Only the first matter was within the jurisdiction of the court, but not the second. The court could not assume jurisdiction by ignoring and rejecting a portion of the award and the court was wrong in treating that portion as a nullity on the ground that there having been no conveyance in favour of the creditor, that portion of the award which declared his ownership was a nullity.

*First Appeal No. 48 of 1932, from an order of Mathura Prasad, Subordinate Judge of Benares, dated the 9th of January, 1932.

Mr. *B. Malik*, for the appellant.

Sir *Tej Bahadur Sapru* and Messrs. *Shiva Prasad Sinha* and *C. B. Agarwala*, for the respondent.

KING and NIAMAT-ULLAH, JJ. :—This is a defendant's appeal arising out of an order passed by the Subordinate Judge of Benares under paragraph 21 of the second schedule of the Code of Civil Procedure ordering an award to be filed and pronouncing judgment according to the award.

The appellant Babu Upendra Nath Basu was defendant No. 1 in the suit. In the year 1908 he purchased certain zamindari property in a village called Raitar in the district of Patna, which is in the province of Bihar and Orissa. In 1912 the appellant borrowed a sum of Rs.61,000 from Ishwari Prasad and in 1914 Ishwari Prasad and the appellant agreed that Ishwari Prasad should have a half share in the Raitar property in lieu of his loan. No conveyance was executed in Ishwari Prasad's favour but the appellant continued to manage the Raitar property both for Ishwari Prasad and for himself and to pay a half share of its profits to Ishwari Prasad.

After Ishwari Prasad's death his sons and grandson entered into an agreement with the appellant on the 25th of April, 1925, in respect of the Raitar property. It was agreed that the appellant should execute a conveyance to the heirs of Ishwari Prasad in respect of one-half of the property and that he should continue to manage it on behalf of both parties. It was further agreed that in case of dispute, the dispute should be referred to arbitration. Disputes arose, and on the 3rd of April, 1928, the appellant and the heirs of Ishwari Prasad referred their disputes to arbitrators. The terms of reference required the arbitrators to go into the accounts and the transfer of the Raitar property. On the 1st of August,

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Het Lal, who is one of the sons and heirs of Ishwari Prasad, applied to the Subordinate Judge of Benares under paragraph 20 of the second schedule for an order that the award be filed in court and that a decree be passed accordingly. The appellant resisted the application on several grounds, one of which was that the Subordinate Judge of Benares had no jurisdiction over the subject-matter of the award. The court below remarked that the award related to two matters, namely to accounts and to transfer of Raitar property. So far as the accounting and the award of money to the plaintiff and defendants 2 to 4 were concerned, it was admitted that the court had jurisdiction. It may be here observed that the parties are residents of Benares. In so far as the award related to the transfer of Raitar property the court below came to the conclusion that in reality the heirs of Ishwari Prasad were not legally owners of a half share and that the clause in the award which declared the ownership of those persons in the Raitar property was a mere nullity. The learned Subordinate Judge therefore treated the award as granting merely certain sums of money to the heirs of Ishwari Prasad and treated the clause in the award relating to ownership in Raitar property as a mere nullity which could be ignored without affecting the rest of the award. The result was that the court below passed an order that the award be made a rule of the court, excepting the portion which deals with the ownership of the Raitar property.

The appellant challenges the order of the court below on several grounds, but for the purpose of disposing of

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this appeal it is only necessary for us to consider the objection that the court below had no jurisdiction to pass the order that the award be made a rule of the court subject to a certain modification.

The question raised depends upon the interpretation of schedule II, paragraph 20, clause (1) which lays down that "Where any matter has been referred to arbitration without the intervention of a court, and an award has been made thereon, any person interested in the award may apply to any court having jurisdiction over the subject-matter of the award that the award be filed in court." The question is whether the Subordinate Judge of Benares had jurisdiction over the subject-matter of the award. The award, as we have already stated, dealt with two principal points, one was the sum of money due from the appellant to the heirs of Ishwari Prasad in respect of the profits of Raitar property; the other point related to the transfer of Raitar property, i.e. the question whether the appellant should execute a conveyance in respect of a half share of the Raitar property in favour of the heirs of Ishwari Prasad, or whether he should buy out their interests in the property.

It is argued for the appellant that the court must have jurisdiction over the whole of the subject-matter of the award and that as the Raitar property, which forms the subject-matter of the award, is outside the territorial jurisdiction of the court, the court has no jurisdiction under paragraph 20. Several authorities have been cited for the proposition that the court must have jurisdiction over the whole of the subject-matter. In *Krishna Iyer* v. *Subbarama Iyer* (1) it was held that the expression "the subject-matter of the award" in paragraph 20 of schedule II of the Code of Civil Procedure means the whole, and not the whole or a portion, of the subject-matter of the award and that a court within whose jurisdiction a portion of the immovable properties forming

(1) (1932) I. L. R., 55 Mad., 689.

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the subject-matter of an award is not situated has no jurisdiction to entertain an application to file the award. That case related to the partition of joint family property which was situated partly in British India and partly outside British India. It was argued that the decree might be confined to the subject-matter of the award in so far as it was within the jurisdiction of the British Indian courts. The learned Judges held that it was not open to the court to direct the award to be filed in part and to pass a decree in terms of portions only of the award under paragraph 20 of the second schedule. In the present case the court below has only been able to assume jurisdiction by treating the award as merely an award of money and by disregarding the portion relating to the ownership of the Raitar property. On the strength of the Madras ruling, the court below was not justified in passing a decree in terms of a portion only of the award and we think the court took an erroneous view in treating the portion relating to the ownership of Raitar property as a mere nullity. In the Madras ruling cited above a number of authorities on the same point are mentioned and relied upon and it is unnecessary for us to discuss the rulings separately. In the present case we think it is unnecessary to decide that where an award relates to immovable property, then the court has no jurisdiction under schedule II, paragraph 20, unless every item of the immovable property is within the territorial jurisdiction of the court. It appears to us that, even according to the respondents' contention, the question of jurisdiction must be decided against them. It was argued for the respondents that the question of jurisdiction must be decided with reference to the provisions of sections 16 to 20 of the Code of Civil Procedure. That contention seems to us sound. In order to decide whether the court has jurisdiction over the subject-matter of the award, it is necessary to consider the reliefs granted by the award and to determine whether the court would have jurisdiction to try a regular suit between the parties in which the

reliefs claimed were the reliefs granted by the award. For the purpose of deciding the question it seems necessary to refer to sections 16 to 20 of the Code, as these seem to be the only rules of law applicable. If this test is applied, however, we think that the decision must be against the respondents. Under section 16, clause (*d*), it is laid down that a suit "for the determination of any other right to or interest in immovable property" must be instituted in the court within the local limits of whose jurisdiction the property is situate. It appears to us that the award did determine that the heirs of Ishwari Prasad had a legal title to a half share in the Raitar property and that they were entitled to retain their ownership until they had received certain sums of money from the appellant. It has been contended for the respondents that no question of title was raised or decided and that there never was any dispute regarding the ownership of the Raitar property. This is only true in a certain sense. The appellant apparently never contested the fact that the heirs of Ishwari Prasad were entitled to a half share in the Raitar property. If their rights had not been acknowledged, there could have been no meaning in the reference to arbitration regarding the share of profits due to the heirs of Ishwari Prasad. In another sense, however, there was a dispute regarding ownership No deed of conveyance has been executed in favour of Ishwari Prasad's heirs and there was some dispute whether such a conveyance should be executed and, if so, on what terms, or whether Ishwari Prasad's heirs should relinquish their interests in the Raitar property in lieu of hard cash and, if so, what amount. We think that in view of the pleadings it is not open to the plaintiff to argue that there never was any dispute regarding the proprietorship of village Raitar. In the very first paragraph of the plaintiff's application he states "that there was a dispute between the parties regarding the proprietorship of village Raitar in the district Patna." On the plaintiff's own showing, therefore, there was such a dispute and we have

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already indicated the nature of the dispute. As the award declared the legal ownership of Ishwari Prasad's heirs in the Raitar property and declared that they were entitled to retain their ownership until the specified sums of money had been paid to them, we think that under section 16(*d*) the suit could only be instituted in a court within the local limits of whose jurisdiction the Raitar property is situated.

It has been contended that the proviso to section 16 is applicable, but in our opinion, when the relief granted by the award is a declaration of proprietary title to certain immovable property the proviso is not applicable. The arbitrators in effect gave Ishwari Prasad's heirs a charge over the immovable property until the specified sums were paid to them, and the terms of the award were similar in many respects to a decree for redemption.

In our opinion, therefore, the court below had no jurisdiction over the subject-matter of the suit within the meaning of schedule II, paragraph 20 and the appeal must be allowed. We allow the appeal with costs here and in the court below. The application filed in the lower court will be returned to the plaintiff respondent.

Before Mr. Justice Thom and Mr. Justice Rachhpal Singh

1933
March 2,

NAGESHAR PRASAD (SURETY) *v.* GUDRIMAL NARAIN DAS (DECREE-HOLDER)*

Civil Procedure Code, section 55(4)—*Release from arrest of judgment-debtor intending to apply for insolvency—Surety—Terms of security bond not in accordance with section—Discharge of surety according to actual terms of bond—Whether a nullity—Jurisdiction—Civil Procedure Code, section* 151.

A judgment-debtor was arrested in execution of a decree, but was released under section 55(4) of the Civil Procedure Code on his expressing an intention to apply for insolvency

*Second Appeal No. 106 of 1932, from a decree of Sheo Harakh Lal, Additional Subordinate Judge of Ballia, dated the 7th of November, 1931, reversing a decree of Syed Ali Razi, Munsif of Rasra, dated the 1st of August, 1930.

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and on his furnishing a surety who filed a security bond undertaking that the petition in insolvency would be duly filed and that he would produce the judgment-debtor in court on the date to be fixed by the court. The petition in insolvency was filed within one month, and the judgment-debtor was produced in court on the date fixed; and the court passed an order staying execution proceedings pending the determination of the insolvency proceedings. Two days later, the surety applied for discharge on the ground that he had performed his obligations under the security bond, and after hearing both parties the court passed an order discharging the surety. The insolvency petition was eventually rejected, and thereupon the decree-holder applied that the surety be ordered to produce the judgment-debtor. As, however, the surety bond had been cancelled, the decree-holder applied that the order of cancellation be set aside under section 151 of the Civil Procedure Code by the exercise of the inherent jurisdiction of the court. This application was refused by the court, but was allowed by the lower appellate court.

Held that although the terms of the security bond might not have been in accordance with the provisions of section 55(4), yet the bond having been accepted as executed, the surety was entitled to stand upon its terms; and those terms having been carried out, the bond was rightly cancelled, though the insolvency proceedings had not terminated and further proceedings in execution might yet be taken. The order of cancellation was passed with jurisdiction and was not a nullity.

The order of cancellation could not be set aside under section 151 of the Civil Procedure Code. Though it was not appealable, the decree-holder had a remedy by way of revision, of which he did not avail himself. It is well established that where a party considers a decree or order of the court unjust and has neglected to avail himself of the remedy provided by the Civil Procedure Code, e.g. his right of appeal or of application in revision, it is not open to him subsequently to invite the court by virtue of its inherent jurisdiction reserved by section 151 to disturb that decree or order which he has failed to challenge in the statutory manner and within the statutory period.

Mr. *Krishna Murari Lal*, for the appellant.

Dr. *N. P. Asthana*, Messrs. *Gopalji Mehrotra* and *J. P. Bhargava*, for the respondents.

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THOM and RACHHPAL SINGH, JJ. :—The respondents, the firm Gudrimal Narain Das, obtained a simple money decree against one Raghunath Prasad on the 26th of April, 1926. In execution thereof Raghunath Prasad was arrested on the 20th of April, 1929. On this date Raghunath Prasad filed an application in the court of the Munsif of Rasra, in which he stated that it was his intention to apply to be adjudged an insolvent and in respect whereof he craved his release. The court ordered his release and stayed execution proceedings on condition that he furnished security under section 55(4) of the Code of Civil Procedure. The judgment-debtor furnished the appellant Nageshar Prasad as surety. The latter executed a surety bond under which he undertook (1) that the judgment-debtor would file an insolvency application in the court of the District Judge, and (2) that he, as surety, would produce the judgment-debtor in court on the date to be fixed by the court. The date fixed was 21st of May, 1929. On the 7th of May the application to be declared an insolvent was filed by the judgment-debtor. On the 21st of May the judgment-debtor was produced in court. On the 23rd of May the appellant applied to have his surety bond cancelled in respect that he had discharged the obligations undertaken by him thereunder. Parties were heard upon this application and on the same day, namely the 23rd of May, the court passed an order discharging the appellant.

The insolvency application of the judgment-debtor was eventually rejected some time after the surety had been discharged. Thereupon the decree-holder applied on the 10th of July, 1930, for an order that the appellant be ordained to produce the judgment-debtor and in default thereof that execution should be enforceable against the appellant. As the surety bond had been cancelled by the order of the 23rd of May, 1929, the respondent filed a further application on the 28th of July, in which he prayed that this order be set aside by the court in the

exercise of its inherent jurisdiction reserved to it by section 151 of the Code of Civil Procedure. On the 28th of July, 1930, it was not open to the respondent to challenge the order of May, 1929, by way of appeal, the statutory period for appeal having expired.

The learned Munsif held that it was not open to the court to disturb the order of the 23rd of May, 1929, as the respondent had neglected to avail himself of his statutory remedy. Having failed to take advantage of his statutory remedy, it was not open to respondent to invoke the provisions of section 151. He accordingly dismissed the respondent's application against the appellant.

The learned Additional Subordinate Judge in the lower appellate court has held that the order of the 23rd of May, 1929, discharging the surety is null and void, and he has accordingly allowed the respondent's claim.

The argument that the respondent was entitled under section 151 to have the order of the 23rd of May, 1929, reviewed and set aside was not pressed before us in appeal. It was contended at some length that the order, inasmuch as it was not made in an application against the surety by the decree-holder, was not a decree within the meaning of the Code of Civil Procedure. It was not appealable and the remedy of appeal was, therefore, not available to the respondent. With this argument we are in agreement and in this connection we refer to two rulings, namely *Ram Kishun* v. *Lalta Singh* (1) and *Ramanathan Pillai* v. *Doraiswami Aiyangar* (2). These two rulings clearly support the respondent's contention in this connection. It was admitted, however, that the respondent had a remedy by way of revision. It is well established that where a party considers a decree or order of the court unjust and has neglected to avail himself of the remedy provided by the Code of Civil Procedure, e.g. his right of appeal or of application in revision, it is

(1) (1928) I. L. R., 51 All., 346. (2) (1919) I. L. R., 43 Mad., 325.

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not open to him subsequently to invite the court by virtue of its inherent jurisdiction reserved by section 151 to disturb that decree or order which he has failed to challenge in the statutory manner and within the statutory period. But as already remarked, this point was given up by the respondent in the course of the hearing.

In support of his appeal the appellant has argued that he is no longer a surety; by the order of the 23rd of May, 1929, his responsibility under his surety bond has been cancelled and that, therefore, the court cannot hold him liable under it. The respondent has argued in reply that the surety bond was executed under section 55(4) of the Code of Civil Procedure and could not be cancelled till the termination of the insolvency proceedings. We have considered the terms of the bond. Upon the face of it the bond does not appear to have been executed under any section of the Code of Civil Procedure. No reference is made to section 55(4). It may be that the court should not have accepted the bond as executed, but the fact is that it did accept the bond without any objection on the part of the respondent. In these circumstances we are of opinion that the appellant is entitled to stand upon the terms of the bond, and it is not open to the respondent to have imported into the bond provisions which are not there.

The appellant argued in the second place that assuming that the order of the 23rd of May, 1929, was a bad order, it cannot now be challenged since the respondent did not take steps to challenge it timeously. We have already dealt with this argument, with which we have declared our agreement. The respondent, however, has contended that the order of the 23rd of May, 1929, was *ab initio* null and void. The lower court had stayed execution proceedings pending the determination of the insolvency proceedings and the latter not having been terminated upon the 23rd of May, 1929, the court, he maintained, had no jurisdiction to pass the order cancelling the bond on that date. We are unable to

accept this contention. It was not disputed by the learned counsel for the respondent that the lower court had jurisdiction to entertain the application made upon the 23rd of May, 1929, by the appellant for his discharge as surety. Further, it is possible to envisage many circumstances in which the granting of such an order upon an application for discharge would not only be within the jurisdiction of the court but indeed just and equitable. We cannot therefore regard the order of discharge of the 23rd of May, 1929, as a fundamental nullity which the respondent was and is entitled to ignore. We are of opinion that the order was a just order in the circumstances, but, just or unjust, it certainly was not a nullity. Whether a decree or order of the court is a nullity or not may sometimes be a somewhat complicated problem. There may be border-line cases where the question is attended by a considerable difficulty. This matter was considered in the case of *Ashutosh Sikdar* v. *Behari Lal Kirtania* (1). In the course of their judgment their Lordships of the Privy Council stated that one well established test of whether an order or decree is a nullity or a mere irregularity is,—is it open to the parties against whom the decree or order is passed to waive objection to it? Applying that test in the present case it is clear that the order of the 23rd of May, 1929, was not a nullity. It was an order which the court had jurisdiction to pass upon consideration of the appellant's application for discharge.

We hold (1) that the order of the 23rd of May, 1929, is sound in law; (2) that in any event it cannot now be challenged by the respondent; and (3) that the appellant has been discharged as surety in connection with the proceedings against Raghunath Prasad. In the result the appeal is allowed, and the appellant will have his costs throughout.

(1) (1907) I. L. R., 35 Cal., 61(72).

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Thom

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March, 6

SHAMBHU PRASAD AND ANOTHER (DEFENDANTS) *v.* MAHADEO PRASAD AND OTHERS (PLAINTIFFS)*

Transfer of Property Act (IV of 1882), section 41—Transfer by ostensible owner—Estoppel against real owner and persons claiming under him—Hindu daughter allowing another person to be in possession of her estate as ostensible owner—No estoppel against reversioners—Adverse possession—Adverse possession against limited owner whether adverse possession against the reversioners.

A Hindu daughter succeeded to her father's estate, but she allowed her uncle's name to be entered in the revenue papers in respect of the estate and the uncle took possession. Subsequently the uncle, as ostensible owner, transferred a part of the estate to the defendants. Later on, the daughter died; and within twelve years of her death her sons sued to recover possession from the defendants. *Held* that the plaintiffs were not estopped under section 41 of the Transfer of Property Act from claiming the property. Section 41 of the Transfer of Property Act refers to personal estoppels arising out of the conduct of the real owner and affecting him and persons claiming through him. The plaintiffs, who were reversioners, did not derive their title from the daughter and, therefore, section 41 could not apply to them. The mere fact that the estate was vested in the limited owner for the time being could not create an estoppel against the reversioners by virtue of the conduct of, or consent obtained from, the limited owner.

Held, further, that during the lifetime of the limited owner the possession of the uncle or of his transferees could not be adverse to the reversioners so as to destroy their contingent rights. The plaintiffs' cause of action arose on the death of the limited owner, and the suit brought within twelve years of the death was not barred by limitation.

Mr. *Shambhu Nath Seth*, for the appellants.

Dr. *K. N. Katju* and Messrs. *Shiva Prasad Sinha* and *Sri Narain Sahai*, for the respondents.

*First Appeal No. 272 of 1929, from a decree of J. C. Malik, Additional Subordinate Judge of Fatehpur, dated the 22nd of April, 1929.

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SHAMBHU PRASAD v. MAHADEO PRASAD

SULAIMAN, C. J., and THOM, J. :—This is a defendants' appeal arising out of a suit for recovery of possession of certain immovable properties.

It appears that there were two brothers, Ram Rattan and Gajadhar Prasad, of whom the former died about the beginning of 1909. He left a daughter, Mt. Saraswati, whose sons the present plaintiffs are. There was some dispute in the mutation proceedings in which Mt. Saraswati made a statement that Gajadhar Prasad was the heir of the deceased. Gajadhar Prasad's name was accordingly entered in the revenue papers and he got possession. Gajadhar Prasad later on transferred part of the properties on the 10th of September, 1914, to the defendants appellants. In 1922 Mt. Saraswati died. After her death the present suit was instituted by her sons on the 10th of May, 1928, against the transferees.

The plaintiffs' case was that the transfer of possession by Mt. Saraswati to Gajadhar Prasad was without any legal necessity and that the transfer by Gajadhar Prasad to the defendants was not binding on them.

The claim was contested by the defendants on the following grounds : (1) That Gajadhar Prasad was joint with Ram Rattan and therefore Mt. Saraswati never inherited any property from her father at all; (2) that Ram Rattan left a son Ram Shankar and the surviving son inherited the estate and that as a result Mt. Saraswati never got the estate; (3) that the defendants were protected under section 41 of the Transfer of Property Act, and that the claim was barred by time. The court below has found against the defendants on all these points.

So far as the question of jointness or separation is concerned there is plenty of evidence on the record which shows that there had been a partition in the family and that Ram Rattan and Gajadhar Prasad were separate. We think it unnecessary to refer to all the evidence in

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detail because we are satisfied that the finding of the court below is perfectly correct.

Similarly, the finding of the court below that it is not proved that Ram Rattan left any sons surviving him is sound.

* * * * *

We are also of opinion that section 41 of the Transfer of Property Act can have no application to the facts of this case. The present plaintiffs are not deriving their title from Mt. Saraswati nor are they claiming through her. They claimed title through their grandfather Ram Rattan. It is therefore quite obvious that even if Gajadhar Prasad was in possession of the estate as an ostensible owner with the consent of Mt. Saraswati, her consent would not bind the present plaintiffs. Their cause of action arose on the death of Mt. Saraswati, and they are in no way bound by the action of the limited owner. Indeed, they are challenging it. When a Hindu lady cannot without legal necessity transfer a part of the estate in her possession so as to bind the reversioners, much less can she by orally transferring possession and putting such person in possession destroy the rights of the reversioners in case such person transfers the property. No authority has been cited in support of the contention that section 41 of the Transfer of Property Act would protect the defendants as against the reversioners, and we are clearly of opinion that no such estoppel can arise. Section 41 refers to personal estoppels arising out of the conduct of the plaintiffs or persons through whom they are claiming, and the mere fact that the Hindu widow's estate is vested in the limited owner for the time being cannot create an estoppel against the reversioners by virtue of the consent obtained from the limited owner.

We are also of opinion that the plea as to limitation must fail. As pointed out above, the present suit was instituted within 12 years of the death of Mt. Saraswati.

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The plaintiffs' cause of action arose on her death and not earlier. During the lifetime of the limited owner the possession of Gajadhar Prasad or his transferees could not be adverse to the reversioners so as to destroy their contingent rights. This point has been recently settled by a Full Bench of this Court which we are bound to follow: *Bankey Lal* v. *Raghunath Sahai* (1).

* * * * *

The result is that this appeal is dismissed with costs.

REVISIONAL CRIMINAL

Before Mr. Justice Young

EMPEROR *v.* MAHMUD ALI KHAN*

1933
March, 7

Search-witness—Should himself be searched first—Constables and others raiding a house and finding illicit liquor, opium and ammunition—Evidence liable to be discounted by failure to have themselves searched—Indian Penal Code, section 71—Limit of punishment for offence made up of several offences—United Provinces Excise Act (Local Act IV of 1910), section 60, clauses (a), (b) and (f).

On receipt of information that illicit liquor was being manufactured in a certain house, the police conducted a raid upon the house. Implements for manufacturing liquor and liquor in various stages of manufacture were found; also, about one ounce of crude opium and six revolver cartridges were found. No search of the constables and the search-witnesses had been carried out before entering the house. The owner of the house was convicted, and separately sentenced, under section 60(*a*) of the U. P. Excise Act, section 60(*b*) and (*f*) of the same Act, section 9(*c*) of the Opium Act, and section 19 of the Arms Act.

Held that the fact that a search of the constables and of the search-witnesses had not been carried out before entering the house was enough to throw doubt upon that part of the case which related to the discovery of the opium and the cartridges, which were of such small quantity and bulk that it would be a simple matter for any one to take them into the

*Criminal Revision No. 816 of 1932, from an order of Gauri Prasad, Sessions Judge of Farrukhabad, dated the 5th of September, 1932.

(1) (1928) I. L. R., 51 All., 188.

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house. The rule as to such search ought never to be neglected. Where an informer, as in these cases under the Excise Act, obtains a substantial reward for information leading to a conviction, there is a very great temptation for him, acting in conjunction with the police constables, to plant in the house of a suspected person excisable articles in order that he may obtain the reward. Every one engaged in a raid of this sort must be searched to see that there is no excisable article upon him, and failure to carry out this rule must give to the defence a very strong argument against conviction.

Held, also, that when a man was found guilty of the major offence of illicitly manufacturing excisable articles, it was unreasonable that he should also be severely punished for keeping in his possession materials for manufacturing those articles and for possessing such articles. The one offence included all the others; and having regard to section 71 of the Indian Penal Code, a sentence under section 60(*b*) of the Excise Act should be passed and the separate sentences under section 60(*a*) and (*f*) should be set aside.

Mr. *N. A. Sherwani*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

YOUNG, J. :—This is an application in revision from the decision of the learned Sessions Judge of Farrukhabad. The applicant, Mahmud Ali Khan, was charged under section 60(*a*), (*b*) and (*f*) of the U. P. Excise Act, section 9(*c*) of the Opium Act, section 19 of the Arms Act and section 332 of the Indian Penal Code before a Magistrate of the first class. He was found guilty by the learned Magistrate and sentenced to one year's rigorous imprisonment and a fine of Rs.500 under section 60(*a*) of the Excise Act and one year's rigorous imprisonment and a fine of Rs.500 under section 60(*b*) and (*f*) of the same Act. Under section 9(*c*) of the Opium Act he was sentenced to one year's rigorous imprisonment and a fine of Rs.100. Under section 19 of the Arms Act he was sentenced to one year's rigorous imprisonment. Under section 332 of the Indian Penal Code he was sentenced to four months' rigorous imprisonment; the sentences to run consecutively, making a

total in all of four years and four months' rigorous imprisonment, and the fines amounted in all to Rs.1,100.

The police of Farrukhabad obtained information that Mahmud Ali Khan was manufacturing in his house, on the outskirts of Farrukhabad, illicit liquor. The Deputy Superintendent of Police and the Joint Magistrate conducted a raid upon the house of Mahmud Ali Khan. They went there in the morning at 8 o'clock with fifty constables. The house was surrounded, and the entrance door being locked, a constable was detailed to scale the wall of the compound and get into the house. The constable did so and was heard shouting that he was being beaten. Another constable was sent in to assist. One of the constables then opened the door. The Deputy Superintendent and the other constables rushed in. It is alleged that Mahmud Ali Khan was found in the room and when he saw the Deputy Superintendent of Police and the other constables rush in, he attempted to assault the Deputy Superintendent of Police with a *lathi*. The Deputy Superintendent of Police used a pistol. The bullet fortunately struck the *lathi* and Mahmud Ali Khan surrendered. A large amount of implements for manufacturing liquor, and pots and earthen jars containing liquor in its various stages of manufacture were found. A well in the house was searched and some liquor was found hidden in it. In a steel box a packet containing 2 tolas, that is, rather less than 1 ounce, of crude opium was discovered, and hanging on the wall was a coat in the pocket of which six ·450 revolver cartridges were discovered.

I am satisfied that Mahmud Ali Khan and his brothers, who are not before me, were engaged in manufacturing liquor illicitly on a fairly large scale. A large amount of silver coins of small denomination were discovered in the house. These obviously had been obtained from customers for the liquor. There can be no question of Mahmud Ali Khan's guilt with regard to the charges under the Excise Act.

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With regard to the charge under the Opium Act I am in doubt. It has been admitted by the police and the Magistrate that the search of the constables and the search-witnesses was not carried out before entering the house. The rule as to this ought never to be neglected. Where an informer, as in these cases under the Excise Act, obtains a substantial reward for information leading to a conviction, there is a very great temptation for him, acting in conjunction with the police constables, to plant in the house of a suspected person excisable articles in order that he may obtain the reward. It is for these reasons, among others, that the rule has been laid down that every one engaged in a raid of this sort must be searched to see that there is no excisable article upon him. Failure to carry out this rule must give to the defence a very strong argument against conviction. It is also in the interest of the public that this necessary rule should be strictly complied with. In this case the amount of opium found in the house was of a very small quantity. Further, the six cartridges which were discovered in the jacket hanging upon the wall would not take up much room. It would be a simple matter for any one to take this small quantity of material into the house. With regard to the cartridges, it is also noteworthy that the raid was conducted suddenly and without giving Mahmud Ali Khan any time to get rid of incriminating articles. No revolver was discovered in the house. It is true that it is said that an empty cardboard box which originally contained cartridges was found in a steel box. Still it is impossible to be absolutely certain, under the circumstances, that that might not have been placed there. I do not say that the police did in fact plant these articles in the house, but the fact that the ordinary search was not carried out is enough to throw doubt upon this part of the case. In any event, the possession of 1 ounce of crude opium is by itself not a serious offence. Three tolas of Government manufactured opium may be purchased by any one

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in the bazar, and I have no doubt that in any bazar crude opium, though illegal, may be purchased also.

With regard to the assault alleged, the learned Magistrate who tried the case appeared to have been in some doubt as to the attack upon the Deputy Superintendent of Police. The Deputy Superintendent of Police may have thought that Mahmud Ali Khan intended to attack him. The roof of the house was low and in the room it was almost impossible to use a *lathi*. Further, it is extremely unlikely that after Mahmud Ali Khan had already seen two constables, on seeing the Deputy Superintendent of Police and a mass of constables he would have attacked the Deputy Superintendent of Police. With regard to the assault upon the two constables it is noteworthy that their injuries were slight, consisting of bruises on the inside of the elbow and one abrasion on the outside of the arm. The bruises on the inside of the elbow were much more likely to have been caused in scaling the wall than by a *lathi* blow. But on the evidence of the constables themselves I am satisfied that some form of resistance was shown by Mahmud Ali Khan which amounted to an assault.

The result is that I set aside the conviction and sentence under the Opium Act and the Arms Act. With regard to the Excise Act the courts below, I think, have gone astray. It seems to me unreasonable, when a man is found guilty of the major offence of illicitly manufacturing excisable articles, that he should also be severely punished for keeping in his possession materials for manufacturing those articles and for possessing them. The one offence includes all the others. Further, section 71 of the Indian Penal Code provides for this. It is there laid down that "Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided"; and also "Where

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several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences." The separate sentences under section 60(*b*) and (*f*) combined of the Excise Act must therefore go. With regard to the conviction under section 60(*b*) it will stand. The sentences under section 60(*a*) and (*f*) will be set aside. With regard to the sentence under section 60(*b*) it appears to me that for a first offence one year's rigorous imprisonment is too much. The illicit manufacture of liquor is primarily an offence against the revenue. It is not like being in possession of or selling cocaine. In the case of a first conviction I consider that a sentence of six months' rigorous imprisonment and a fine of Rs.500 is sufficient punishment under the circumstances. I therefore set aside the sentence of one year's rigorous imprisonment and substitute therefor a sentence of six months' rigorous imprisonment. The fine of Rs.500 will stand. In default of payment of the fine Mahmud Ali Khan will undergo further rigorous imprisonment for three months. For the assault the sentence of four months' rigorous imprisonment is set aside and a sentence of two months substituted; the sentence to run concurrently with the sentence under section 60(*b*) of the Excise Act. The application in revision is otherwise rejected.

Before Mr. Justice Young

EMPEROR *v.* SUDESHARA*

1933
March, 9

Criminal prosecution—Dispute of a civil nature—Using the criminal courts for enforcing a civil claim—Indian Penal Code, section 420—Cheating—Jurisdiction—Civil and criminal courts.

The complainant had pawned certain ornaments with the accused, Mst. Sudeshara; he alleged that he repaid the money

*Criminal Revision No. 12 of 1933, from an order of W. Y. Madeley, Sessions Judge of Benares, dated the 9th of November, 1932.

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but the accused refused to return the ornaments. A charge under section 420 of the Indian Penal Code was brought. The defence was that the transaction took place through one Mst. Katoni, and that Mst. Katoni subsequently borrowed another Rs.80, and therefore the pawnee would not return the articles until the subsequent loan was repaid. At the trial Mst. Katoni's evidence supported the accused. The accused was, however, convicted and sentenced. *Held*, in revision, acquitting the accused, that the dispute in this case clearly ought to have been settled in the civil court. Persons having claims, often of a doubtful nature, frequently took criminal proceedings in the hope that the defendant would pay up the amount claimed rather than face a criminal charge; but to use the criminal courts for enforcing a civil claim was highly improper, and might almost amount to blackmail.

Mr. *M. L. Chaturvedi*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

YOUNG, J. :—This is an application in revision from the order of the Sessions Judge of Benares, by which order he confirmed the conviction and sentence passed upon the applicant under section 420 of the Indian Penal Code. The complainant pawned certain ornaments with the accused, Mst. Sudeshara. He alleged that he repaid her the money, but that she refused to return the goods. The defence was that the transaction took place through one Mst. Katoni, and that Mst. Katoni subsequently borrowed another Rs.80, and naturally the pawnbroker would not return the articles until the subsequent loan was repaid. There was a dispute in this case, which I think clearly ought to have been settled in the civil court. I do not intend to go into the merits of the matter, but it is worthy of note that Mst. Katoni did give evidence in the criminal case in favour of the accused. Too often do persons with claims—often doubtful—take criminal proceedings in the hope that the defendant will pay the amount claimed rather than face a criminal charge. To use the criminal courts for enforcing a civil claim is highly improper;

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it may almost amount to blackmail. The learned Judge in the court below says: "It is true that the case might very naturally have been brought in a civil court, and the complainant possibly chose the criminal courts simply because they are cheaper." This is no ground for making a criminal charge against a person against whom there is a civil claim. I accept the application in revision, set aside the conviction and sentence and order the fine, if paid, to be refunded. The complainant will be left to his remedy in the civil court.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Thom

1933
March, 9

EDUCATIONAL BOOK DEPOT AND ANOTHER (DEFENDANTS) *v.* RABINDRA NATH TAGORE (PLAINTIFF)*

Copyright Act (III of 1914), *section* 2(1), *proviso* (iv)—*Incorporation in school text-book of passages from several copyright works by the same author—Whether each poem in a book of poems by the same author is a separate "work" within the meaning of the proviso—Estoppel—Author acquiescing in infringement by some others—Civil Procedure Code, order* VI, *rule* 15—*Verification by unauthorised person.*

A suit regarding infringement of copyright was brought against the printer and publisher of a book named "Intermediate poems for detailed study, 1929". This book contained 14 poems, which had been recommended by the Board of Intermediate Education for study in schools for the Intermediate examination, together with paraphrases and notes. Four out of these fourteen were poems by Dr. Tagore, one being taken from his book "Gitanjali," two from his book "Gardener", and one from his book "Crescent Moon". The defendants claimed protection under section 2(1), proviso (iv), of the Copyright Act.

Held, that the defendants could not bring themselves within section 2(1), proviso (iv), of the Copyright Act, under which not more than two passages from works by the same author are permitted to be included in a compilation published for

*First Appeal No. 491 of 1929, from a decree of B. S. Kisch, District Judge of Allahabad, dated the 1st of June, 1929.

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the use of schools. The proviso does not say that two passages from *each* work of the same author are permissible; what it permits is two passages in all from works by the same author. The question whether each poem in a volume of poems by one author is a separate "work" within the meaning of the proviso is not necessary to be decided in this case.

Held, also, that the fact that the author might have acquiesced in some other publishers having infringed his copyright by borrowing these very poems did not create any sort of estoppel against him.

Held, also, that verification of the plaint by a person who was not an authorised agent of the plaintiff was a mere irregularity which was in no way fatal to the institution of the suit; and any such irregularity was perfectly cured by a later verification by an authorised agent, which was made before the limitation had expired.

Messrs. *Panna Lal, G. S. Pathak, S. B. L. Gaur* and *Hari Pal Varshni*, for the appellants.

Mr. *Sankar Saran*, for the respondent.

SULAIMAN, C. J., and THOM, J. :—This is a defendants' appeal arising out of a suit brought for an injunction and damages under the Copyright Act. The plaintiff is Dr. Rabindra Nath Tagore, who is the author of three books called "Gitanjali", the "Gardener" and the "Crescent Moon". These books had been printed by Macmillan & Company, Limited. A selection of his poems styled "Poems from Tagore" has also been published. The defendant No. 1 is a firm owned by Lala Ram Narain Lal who has brought out a book called "Intermediate poems for detailed study, 1929" which contains one poem out of the first book, two out of the second book and one out of the third. Defendant No. 2 was the publisher of the last mentioned book.

The case for the plaintiff was that the defendants in publishing their book had infringed the copyright of the plaintiff. In the plaint the plaintiff claimed an injunction restraining the defendants from further infringement, for an account of the number of copies of the book sold and unsold and of all sums of money

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received by the defendants, and for an order that the defendants do pay to the plaintiff either the net profits arising from the sale or disposal of the said books or, alternatively, the amount of the damage occasioned to the plaintiff by reason of the defendants printing, publishing and distributing their books.

The claim was resisted by the defendants on numerous grounds. They challenged the regularity of the presentation of the plaint; they denied knowledge of the plaintiff's copyright in the poems, pleaded good faith and protection under section 2(1), proviso (iv) of the Copyright Act and denied that the plaintiff had suffered any damages whatsoever. Several issues were framed by the court below. The learned District Judge came to the conclusion that the copyright in the poems in dispute subsisted and was owned by Dr. Rabindra Nath Tagore. He found that the plea of innocent infringement had not been taken in good faith and that there was no reasonable ground for the defendants to believe that the copyright did not subsist; and that the defendants were not entitled to the benefit of section 2(1), proviso (iv) of the Copyright Act and had accordingly infringed the plaintiff's copyright. In conclusion he fixed Rs.400 as the amount of damages to which the plaintiff was entitled and gave him all costs.

* * * * *

The defendants have come up in appeal and the plaintiff has filed a cross-objection. In appeal the main points urged before us are: (1) that the suit was not maintainable inasmuch as the person who had originally verified the plaint had no authority to do so; (2) that the provisions of section 2(1), proviso (iv) of the Indian Copyright Act protected the defendants; (3) that the plaintiff had acquiesced in the publication by the defendant; and (4) that the damages awarded are excessive. * * * In the cross-objection the plaintiff claims that the amount of damages allowed is inadequate.

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We think that there is no force in the first contention. There is no doubt that the suit was instituted under the authority and with the consent of the plaintiff, though there is also no doubt that Mr. Parkhurst who had first verified the plaint was not an authorised agent and therefore could not probably have verified it on behalf of the plaintiff. On the other hand, he might have done so with the express oral authority of the plaintiff. But this was a mere irregularity which did not altogether vitiate the plaint and was in no way fatal to the institution of the suit. As a matter of fact, in order to avoid all further difficulties the plaintiff got the plaint verified again by his own son who had full authority to do so. This verification was made before the limitation had expired and any irregularity that might have existed was perfectly cured. There was therefore no defect whatsoever in the suit.

In order to consider whether the defendants are protected under the 4th proviso to section 2(1) it is necessary to examine the nature of the alleged piracy. Dr. Tagore's books consist of separate works containing a large number of poems. Four poems out of these three books have been borrowed *in extenso* by the defendants. The defendants' book contains the poems prescribed by the Provincial Board of High School and Intermediate Education. There were 14 poems which were recommended for general study. Out of these, 4 are those of Dr. Tagore. The defendants' book contained all these 4 poems, along with paraphrases and notes. It also contained other prescribed poems with notes.

The proviso to section 2(1) is in the following words: "The publication in a collection, mainly composed of non-copyright matter, *bona fide* intended for the use of schools and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for

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the use of schools in which copyright subsists." It may be assumed that the defendants' book is such a publication, but the question is whether the defendants can bring themselves within the proviso, under which "not more than two of such passages from works by the same author" can be published by the same publisher within five years.

The learned advocate for the defendants contends that inasmuch as the defendants borrowed not more than two poems from each of the works of Dr. Tagore they come within the scope of this proviso. We are unable to accept this contention. The proviso does not say that not more than two of such passages from *each* work of the same author are published, but says "not more than two passages from works by the same author". It seems to us that inasmuch as the defendants have in their book published four passages from the works of the same author they cannot claim the protection of this proviso. Obviously, the proviso was not intended to protect a man who brings out an unauthorised edition of a poet's poems by taking out two poems out of each of the many works published by him separately.

It is accordingly unnecessary to consider whether when a number of poems are brought out in one volume the whole volume is to be considered a literary work of the author or whether each separate poem in that volume is to be considered a separate literary work.

There is no force whatsoever in the contention that there is some sort of estoppel against the plaintiff because he has acquiesced in a previous publication. The plea was based on the ground that other publishers have also borrowed these very poems. We, however, understand that suits have been instituted against some of those. In any case, that is not a matter which can be taken into account in order to create an estoppel against the plaintiff. He has his own remedy against the other people who may have infringed his right.

The only question which remains is one of the amount of damages.

* * * * *

As pointed out above, the plaintiff claimed damages on two alternative bases. The first was the amount of the net profits made by the defendants and the second was an alternative claim for damages occasioned to the plaintiff. Although we presume against the defendants [they having failed to produce any accounts] that all the books were sold and it is admitted that each book was priced at one rupee and therefore we presume that Rs.1,000 must have been realised by the defendants, we are unable to say that the net profits made by the defendants were more than Rs.400, which is the amount assessed by the court below. In the case of their own books the agent of the plaintiff's publishers has admitted that much less than 40 per cent. is the net profit of the company. We do not think that when the remuneration paid to the author who prepared the notes and the costs of printing and advertising the book and the costs of commission are all calculated, the net profits would in any way exceed 40 per cent. We are therefore unable to hold that if the net profits made by the defendants is to be the basis, the amount of damages assessed by the court below is inadequate.

As regards the loss suffered by the plaintiff the difficulty is still greater. The plaintiff's case was that many other books of his were for sale in the market and during the year in dispute the sales had fallen. But it is to be admitted that five other firms have infringed the plaintiff's copyright and they also have incorporated these poems of the plaintiff in their own books. It is therefore very difficult to say that the decrease in the income received by the plaintiff on account of a fall in the sales of his bigger books is not the result of any depression in trade or not the result of the competition of the other firms but is solely due to the publication by the defendants. We

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find it very difficult to hold that Rs.400 does not represent a fair amount of loss which the plaintiff has sustained on account of the publication of the defendants' book, excluding the loss occasioned by other causes. The result, therefore, is that we cannot increase this amount.

* * * * *

It is not necessary for us to consider whether under section 7 of the Copyright Act the plaintiff is entitled to the gross proceeds of the sales of all the books or only to the net proceeds, because in the plaint, as pointed out above, the claim was confined to the net profits arising from the sales.

Under section 6(2) the costs of all parties in the proceedings in respect of infringement of copyright shall be in the absolute discretion of the court. We think that we should not interfere with the award of these costs. The result, therefore, is that the appeal and cross-objection are both dismissed with costs.

FULL BENCH

Before Justice Sir Lal Gopal Mukerji, Mr. Justice Young, Mr. Justice King, Mr. Justice Thom and Mr. Justice Niamat-ullah.

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March, 10

NIHAL CHAND SHASTRI (PLAINTIFF) *v.* DILAWAR KHAN AND ANOTHER (DEFENDANTS)*

Barrister and client—Suit for fees settled—Status of Barrister enrolled as Advocate of Allahabad High Court—Entitled to act—High Court Rules, chapter XV, rules 10, 15—*Contract Act (IX of* 1872), *section* 11—*Legal Practitioners (Fees) Act (XXI of* 1926), *sections* 3 *and* 4—*Whether applicable to criminal cases—Usage—Common law—Public policy—Contract Act (IX of* 1872), *section* 1—*Usage of trade.*

A Barrister of England, enrolled as an Advocate of the Allahabad High Court and practising in that Court or in courts subordinate to it, can bring a suit against his client for recovery of his fees settled for his professional services in acting and pleading for the client.

*Civil Revision No. 173 of 1932.

The rules relating to enrolment of Advocates, contained in chapter XV of the High Court Rules, show that a Barrister of England, as such, is not entitled to practise in these provinces, and it is only by virtue of his being enrolled as an Advocate of the High Court that he can do so. According to these rules, he can appear, plead and act in the High Court or any subordinate court; and there being no solicitors in these provinces he can see and receive instructions from, and act on behalf of, his clients; thus he combines in himself the capacities of a Barrister and a solicitor of England. In these circumstances there seems to be no valid reason why the disability attaching to a Barrister in England against settling and suing for his fees,—a disability based entirely on the usage and the peculiar constitution of the English Bar—, should be deemed to attach to a Barrister practising as an Advocate in these provinces.

When such a Barrister-Advocate is engaged for his professional services, he is engaged, and can perform his engagement, only in his capacity of an Advocate and not in that of a Barrister. Therefore, any incapacity to enter into a contract with his client for fees, which may attach to a Barrister as such, does not attach to him in his engagement as an Advocate, and such a contract is not void on the ground of incompetency under section 11 of the Contract Act. The legal incapacity, in this respect, of the Bar in England has become a rule of the common law of England; but the rules of the common law of England are not in force in this province; so, in this province, a Barrister cannot be said to be subject to any law which disqualifies him from contracting for his fees. Nor could such a rule be applied as being a "usage or custom of trade", referred to in section 1 of the Contract Act, for the profession of a Barrister is not a "trade". Such a contract is not one opposed to public policy and is not void under section 23. Also, if an express agreement or a tacit understanding that the Barrister-Advocate should not sue for his stipulated fee is sought to be set up, then such an agreement would be void under section 28 of the Act. The contract for fees, therefore, fulfils all the requirements of the Contract Act for a valid contract and is enforceable by law.

Smith v. *Guneshee Lal* (1), and *Alston* v. *Pitambar Das* (2), overruled.

No inference adverse to the validity of a Barrister-Advocate's contract for fees for pleading only is to be drawn from

(1) (1871) 3 N.-W. P. H. C. R., 83. (2) (1903) I. L. R., 25 All., 509.

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the fact that the Legal Practitioners (Fees) Act, 1926, provides for the enforceability of a contract for fees for acting and does not mention pleading.

The Legal Practitioners (Fees) Act, 1926, seems to be applicable to criminal proceedings, no less than to civil proceedings, though the question is not free from doubt.

Mr. *Nihal Chand Shastri*, in person.

Messrs. *A. Sanyal* and *Mahbub Alam*, for the opposite parties.

Messrs. *A. M. Khwaja*, *B. Malik* and *M. N. Kaul*, for the Bar Library.

Dr. *K. N. Katju*, for the Advocates' Association.

MUKERJI, J. :—These two revisions have arisen out of a small cause court suit No. 5247 of 1930, instituted by Mr. Nihal Chand Shastri against two defendants, Masood Ahmad Khan and Dilawar Khan alias Dilawar, for recovery of Rs.340. The plaintiff's case was that the defendant No. 2, Dilawar, had a criminal case against him in a Magistrate's court at Muzaffarnagar, where the plaintiff was then practising as an Advocate of the High Court. Masood Ahmad Khan was the plaintiff's clerk. Dilawar Khan wanted the plaintiff to go to Allahabad and file an application for transfer of the criminal case from Muzaffarnagar and agreed to pay Rs.50 a day for the period during which the plaintiff would be away from Muzaffarnagar. As Dilawar Khan had no money to pay down, Masood Ahmad Khan, the plaintiff's clerk, stood surety for him. The plaintiff carried out his part of the contract but was not paid. The plaintiff accordingly brought the suit.

The learned Judge of the small cause court decreed the suit for Rs.250 only, being the principal amount claimed, but dismissed the suit with respect to interest. The claim for interest was disallowed because there was no stipulation to pay any.

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Civil Revision No. 1 of 1932 has been filed by Masood Ahmad Khan, and Mr. Nihal Chand has filed Civil Revision No. 173 of 1932. Dilawar Khan has evidently submitted to the decree.

In his petition of revision Masood Ahmad Khan contended that a certain letter of the 30th of November, 1930, written by the plaintiff to him should have been admitted into evidence, and that in view of that letter the plaintiff's claim as against the applicant should have been dismissed. In his petition of revision the plaintiff contended that he was entitled to interest under section 73 of the Indian Contract Act.

Mukerji, J.

The two petitions came up before the Hon'ble the Chief Justice, and apparently before him the point was taken orally that the plaintiff being a Barrister enrolled in England was not entitled to maintain a suit for his fees. The learned Chief Justice accordingly referred the case to two Judges. This matter came before the learned Chief Justice and one of us, and they thought that the matter should go before a Full Bench. The three Judges before whom the Full Bench case came thought it desirable that the case should go before five Judges, as some doubt was entertained about the correctness of a previous Full Bench decision, *Alston* v. *Pitambar Das* (1).

The case has now been argued fully before the Full Bench, and the Full Bench has had the advantage of hearing Mr. *Khwaja* and Mr. *Malik* as representing the Bar Library and Dr. *Katju* as representing the Advocates' Association.

Before we proceed to decide the most important question as to whether an Advocate who is a Barrister of England can maintain his suit for his fees, I think the other questions involved in the two revisions should be decided.

On the question of the compromise it appears that although Mr. Nihal Chand gave a note to Masood Ahmad Khan that he would not be liable in the case, the note

(1) (1903) I. L. R., 25 All., 509.

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was given subject to certain conditions which have not been fulfilled. Masood Ahmad Khan did not file the letter before the court till the last moment when he found that the case was being decided against him. I am, therefore, of opinion that the decree against Masood Ahmad Khan was a right one on the merits.

Mukerji, J.

As regards the right of the plaintiff to recover interest, I do not think that we should allow any in this case, because, although the suit is based on a contract, there is no evidence that on account of non-payment of the plaintiff's fees he actually suffered a loss. I would, therefore, dismiss the plaintiff's petition in revision.

Now I proceed to consider the point raised by Masood Ahmad Khan orally, namely that the suit itself is not maintainable, the plaintiff being a Barrister of England.

We have to consider the question only with respect to Barristers who have been enrolled in this Court, for we are not aware of the circumstances under which Barristers of England are permitted to practise in other High Courts or in courts subordinate to those High Courts. My opinion, therefore, must be taken as confined to the conditions prevailing in this Court and courts subordinate to this Court.

This Court, under its powers conferred on it by the Letters Patent, is entitled to enrol Advocates for practising in this Court and courts subordinate to it; *vide* clause 7, which runs as follows: "And we do hereby authorise and empower the said High Court of Judicature at Allahabad to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court shall deem meet . . ." The High Court framed certain rules laying down the qualifications needed for enrolment of Advocates. The rules now in force are to be found in chapter XV of the Rules of the Court. They are rules made by the Bar Council since the Bar Councils Act came into force, and they have been approved by the High Court. Under rule 1 of these rules "Any Barrister of England . . . and any graduate in law of any University

mentioned in the schedule, who in each case has further undergone a course of training for one year . . . may present an application for his admission to the Roll of Advocates of the Court." The older rules were more or less on similar lines. The rules and the clause 7 of the Letters Patent show that a Barrister of England, as a Barrister, has no right to practise in the High Court or in any court subordinate to the High Court. Certain qualifications of different kinds are laid down for admission as Advocates, and the fact that a candidate is a Barrister of England is one kind of qualification for enrolment. When a person who has taken the law degree of the Allahabad University is enrolled as an Advocate, he becomes as much an Advocate of the Allahabad High Court as a Barrister of England. The rules of the High Court make no distinction between the two persons with different qualifications. Before the Bar Councils Act was passed and was acted upon, the Barristers from England were admitted on the roll of the High Court as Advocates, while the Indian graduates of law were admitted as Vakils. Later on, certain eminent Vakils were given the status of Advocates and, thereupon, they became as much Advocates as Barristers from England enrolled in the Allahabad High Court. In all these cases the right of a Barrister to appear in the High Court or in the courts subordinate to the High Court arose from his enrolment as an Advocate and not otherwise.

Having been enrolled as an Advocate, the Barrister or the graduate in law of an Indian University acquires certain privileges and the privilege is to appear, plead or act in any suit or appeal; *vide* rule No. 10 of the High Court Rules in chapter XV, page 100. It is common ground that a Barrister in England as such is not entitled to *act*. He can only plead. It follows from the rules of the High Court of Allahabad that the disability of a Barrister-at-law to act in England disappears on his being enrolled as an Advocate of the High Court.

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A Barrister-at-law in England not being entitled to act is not allowed to have a lien on any litigant's papers or money, but a Barrister who is an Advocate of the High Court of Allahabad may have such a lien. This is recognized by rule No. 14, chapter XV, page 101, of the High Court Rules. Rule 15 of the same chapter, at page 102, lays down that an Advocate (including a Barrister-Advocate) is entitled to appear, plead and *act* in any court subordinate to the High Court.

In the province of Agra there are no solicitors, and a Barrister-Advocate practising in the High Court or in any subordinate court is entitled to see his clients and to settle his fees with them. This he cannot do in England.

From what has been said it follows that the peculiar position of a Barrister-at-law in England disappears in the province of Agra on his being admitted as an Advocate of the High Court. He combines in himself the capacities of a Barrister and a solicitor of England. He is as much subject to the disciplinary jurisdiction of the High Court as a non-Barrister Advocate, while a Barrister of England while practising there is not an officer of the court and, in the case of misconduct, his case is referred to the Benchers of the Inn to which he belongs. In England a Barrister cannot act, cannot receive a client or receive instructions from him except through a solicitor. But this disability does not exist in him in the province of Agra, if he has been enrolled as an Advocate.

Cases have been cited before us where in Crown colonies of England, Barristers have combined in them the duties of a Barrister, pure and simple, and the duties of a solicitor. It is not necessary to quote these cases.

The question now arises whether in these circumstances a Barrister-Advocate should not have the privilege of suing his client for his fees.

It is the peculiar rule of England that a Barrister can neither sue for his fees nor can be sued in damages for

not attending to his duties or for performing them negligently. This disability or privilege does not extend to solicitors, though they are permitted not only to act but also to plead in certain inferior courts in England.

Now let us consider the reasons urged as to why a Barrister-Advocate practising in the province of Agra is not to have the privilege of suing his client for his fees. Various reasons have been advanced, and we shall have to consider them one by one.

The first reason urged is that a Barrister of England who comes out to these parts and practises on enrolment as an Advocate carries with him the traditions of the English Bar and by those traditions he is incapable of entering into a contract as to fees with a client. This is a mere assertion and has no substantial ground for support behind it. A Barrister in England is not permitted to see his client or to settle his fees with him, not because he suffers from any disability to make a contract like a minor, but because there has been a usage to that effect. This is peculiar to England and is based on nothing more than a usage. In Halsbury's Laws of England, second edition, volume 2, article 698 deals with the subject "Counsel and Client". It says: "*The usage and etiquette* of the profession of a Barrister require that in all but some exceptional cases counsel should not undertake any professional work as regards which the relation of counsel and client can arise except on the instructions of a solicitor. There is no rule of law to prevent a litigant from instructing counsel directly, or to prevent counsel so instructed from appearing on behalf of the litigant; but a judicial opinion has been expressed that it is expedient in the interests of suitors and for the satisfactory administration of justice to adhere to the usage which requires that counsel should not accept a brief in a civil suit from any one but a solicitor. The exact scope of the usage is not very clearly defined, but it extends to all civil contentious business, and to all criminal business except what is

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known as a 'dock defence' or the conduct of a poor prisoner's defence at assizes or sessions if no solicitor is allocated."

It will be noticed that the rule is based on *usage* and *etiquette* and on them alone. No doubt, attempt has been made from time to time to find out the reason of the rule, but no satisfactory reason has ever been found. In the well known case of *Kennedy* v. *Broun* (1), ERLE, C. J., supported the rule on the ground of public policy. Lord WATSON in the case of *Queen* v. *Doutre* (2), sitting in the Privy Council and delivering judgment of a Board which was constituted by such eminent lawyers as himself, Sir BARNES PEACOCK, Sir ROBERT P. COLLIER, Sir RICHARD COUCH and Sir ARTHUR HOBHOUSE, remarked (at page 751) that the decision might be supported by usage and the peculiar constitution of the English Bar, without attempting to rest it upon general considerations of public policy. It will, therefore, be seen that the real ground of the rule is *usage* and *the peculiar constitution of the English Bar*. Where these considerations do not exist there can be no reason why an Advocate should be under any disability to see his client, contract for fee and realise it by a suit.

A Barrister practising in these provinces breaks all the rules that are peculiar to a Barrister of England. He takes full advantage of the privilege granted to him by the rules of the High Court. He sees his client, settles his fees and acts for him. He can do none of these in England while practising as a Barrister, yet it is said that he carries with him his disability to sue his client in case of his fees not being paid.

We were told in the course of the argument that in the Allahabad High Court there were at least three members of the English Bar practising as Advocates that do not sign any petition on behalf of their clients and thus do not "act"; but these gentlemen must be

(1) (1863) 13 C. B. (N. S.), 677. (2) (1884) 9 App. Cas., 745.

under the necessity of seeing their clients directly and receiving instructions from them. The necessity arises from the mere fact that there are no solicitors through whom they can receive instructions. Even if there had been three out of say two dozen gentlemen who practise as Barrister-Advocates in the High Court itself (and there are so many in the districts), the fact that they try to keep up to the traditions of the English Bar will not make any difference. As I have pointed out, they do not practise as Barristers but as Advocates and the rules permit them to see their clients, settle their fees and to act for them. The argument, therefore, that the Barrister-Advocates carry their traditions of the English Bar with them will not hold water.

The next argument that was advanced was that an agreement to plead, as apart from an agreement to act, could not constitute a contract because the subject-matter was such as made a contract impossible. The argument is advanced in this way. A client may have engaged a counsel to represent his case before a court and the client expects that the counsel will show the best fight possible. The counsel on studying the brief finds that there is no case for his client to be put forward, and then it will be his duty to tell the court frankly that his client has no case. Assuming that the professional duty of a counsel required him to behave in the way mentioned, it does not follow that he commits a breach of the contract which he has entered into with his client. The incidents of the contract, it must be taken, carry with it the possibility of counsel telling the court that his client has no case which can be seriously argued. If the argument that the engagement of a counsel by a client cannot amount to a contract were correct, then the same view would hold good in the case of solicitors in England when they plead, and it would hold good throughout the rest of the world. When a counsel demands a fee, which he thinks he ought to get for the duty he undertakes to do, and the client agrees to pay

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it, there is surely a contract and also a valid contract. I cannot see anything which may induce me to hold that the engagement cannot amount to a contract. There is a proposal for work to be done and there is the consideration and there is an acceptance.

Mukerji, J.

It was argued that under section 11 of the Indian Contract Act there can be no contract of fees by a Barrister because of the law to which he is subject, namely the professional usage of the Bar in England. This argument only begs the question. How a usage of England can be said to be the rule of law to which a Barrister practising in these parts of the country is subject is difficult to see. The law mentioned in section 11 is the law of the land, unless for some reason, which must be substantiated, some other law should apply. I have already shown that the conditions under which a Barrister-Advocate practises in the province of Agra are wide apart from the conditions under which a Barrister practises in England. The argument based on section 11 of the Contract Act will, therefore, not do.

It was pointed out that even if a Barrister-Advocate made a special contract with his client that the latter would not be sued for the fees, such a contract would be void under section 28 of the Indian Contract Act. In reply to this it was argued that section 28 would be inapplicable because of the usage of trade mentioned in section 1 of the Contract Act. But the Barrister's profession cannot be called a trade, and I fear that the exception contained in section 1 of the Contract Act has no application.

Lastly, it was urged that in India all the cases that have been decided for the last 60 years or so have uniformly held that a Barrister practising in India cannot be sued for the refund of fees and that any receipt that he grants for fees received is exempt from stamp duty, because what is paid to him is not a "consideration" for his services but is only an "honorarium". This

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argument, no doubt, would be very strong indeed, but none of the cases cited have considered the position in the way it has been put before us. In some of these cases there are no cogent reasons offered for the decision and others merely follow the previous decisions. I shall consider a few of these cases. The oldest case is of *Smith* v. *Guneshee Lal* (1). This is one of the best considered judgments and yet does not carry conviction to the mind. Smith, a Barrister-Advocate, sued for his fees. In negativing his right of action, it was pointed out that the Barrister-Advocate had been given a higher rank than the other classes of practitioners, and the law of the land did not give him *specifically* a right to sue the client for fees. It being pointed out that the Barrister was enrolled as an Advocate and *acted* for his client, it was said that the court would rule that "he could not divest himself of his character and capacity as an Advocate and that the lower grade of pleader would be merged in the higher one of Advocate". This is hardly a sound argument. It might have been pointed out that, on the same lines, the higher grade of Advocate was pulled down to the lower grade of pleader.

The next case is *Reference under Stamp Act, section* 46(2). The judgment consists of six lines and states as a broad fact that a Barrister's fee for services in litigation is a gratuity or an "honorarium". No reasons whatsoever are given. Although this is a decision of a Full Bench, with all respect I am not able to subscribe to the view expressed therein, at least in this part of the country, and in the circumstances under which a Barrister-Advocate practises here. Something more than a mere statement of the law would be necessary. The next case is *Stamp Reference from the Board of Revenue* (3). It is again a very short judgment and merely quotes the Madras case cited above and remarks as follows: "In our opinion that is a sound interpretation of the law of the Indian Stamp Act on this point,

(1) (1871) 3 N.-W. P. H. C. R., 83. (2) (1885) I. L. R., 9 Mad., 140.
(3) (1893) I. L. R., 16 All., 132.

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and the decision receives the highest confirmation from the ruling of KNIGHT BRUCE and TURNER, L., JJ., in *In re Beavan* (1)." The English ruling quoted has no application to the circumstances under which a Barrister practises as an Advocate of the High Court of Allahabad.

Mukerji, J.

The most important case is that of *Alston* v. *Pitambar Das* (2). This is the case which deals with the question at some length, but unfortunately the considerations now present before us were never fully laid before the Full Bench which decided the case. The facts briefly were these. A counsel was sued for refund of the fees received by him, on the ground that he did not keep his engagement. The defence set up was twofold, one of these being that no suit could be maintained against the defendant. The suit was decreed by the District Judge on appeal and thereupon an application for revision was filed before this Court. In the very beginning of his judgment, STANLEY, C. J., remarks as follows: "The applicant is an English Barrister-at-law who, by virtue of his call to the English Bar, has been enrolled as an Advocate of the High Court of the North-Western Provinces." If his Lordship implied that the defendant, from the mere fact of being an English Barrister, was entitled, as a matter of right, to practise in the North-Western Provinces (as the United Provinces were then called), the statement is rather wide. As I have already pointed out, it was for this High Court to lay down the qualifications of persons who are desirous of being enrolled as Advocates of the High Court. If the High Court laid down as one of the qualifications for enrolment that a candidate who had been called to the English Bar would be eligible for enrolment as an Advocate of the High Court. it did not follow that the Barrister from England had a right to practise *as such* in the High Court or in courts subordinate to it. Where his Lordship, STANLEY, C. J.,

(1) (1854) 23 L. J., Eq., 536. (2) (1903) I.L.R. 25 All., 509.

started giving his reasons for the decision that the defendant could not be sued, he quoted the case of *Kennedy* v. *Broun*, already mentioned, and pointed out what the law in England was. Then, at page 517 he asked himself the question—"Does this rule apply to an English or Irish Barrister practising as an Advocate in these provinces?" The answer given was as follows: "The qualification for the admission of the applicant as an Advocate of this High Court was the fact that he had been called to the Bar in England and was an English Barrister." With all respect, the reason stated was no doubt accurate, but it did not amount to this that an English Barrister practises in these provinces by virtue of his being an English Barrister. His Lordship then asked himself the further question—whether the inability to contract in respect of fees, attaching to the status of an English Barrister by immemorial usage of the Bar, disappeared on his practising in India? In answer to some of the arguments now advanced before us and also advanced before his Lordship, STANLEY, C. J., quoted certain Madras cases and previous Allahabad cases and felt satisfied that the answer to the question must be in the negative. His Lordship's strongest support seems to have been derived from the case of *Queen* v. *Doutre* (1), decided by their Lordships of the Privy Council. Dr. *Katju* has strongly urged that this case did not support the conclusion of STANLEY, C. J., but on the contrary supported the opposite view, to support which it had been cited by the learned counsel for the plaintiff Pitambar Das.

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I have carefully studied the decision in *Queen* v. *Doutre*, and I find nothing in it which supports the view that an English Barrister practising in India, who, being entitled to see his client, settles his fees and acts and pleads for him, is entitled to rely on the English tradition and refuse to submit himself to the liability of

(1) (1884) 9 App. Cas., 745.

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refunding the fees if he fails to keep his engagement. The sentences quoted and underlined in *Alston's* case were sentences which merely explained the case and did not constitute a decision on the merits. As a matter of fact, in that case the Advocate had sued for his fees and his claim was upheld by the Privy Council.

Mukerji, J.

Let us examine the case of *Queen* v. *Doutre* (1) at close quarters. This was a case in which the plaintiff, being a member of the Quebec Bar in Canada, was engaged by the Minister of Justice of the Colony to represent it at an arbitration which was being held in Nova Scotia. The Minister of Justice had asked the plaintiff if he would accept a brief for the Colony and he had agreed. Doutre studied the brief, prepared the case and took part in the pleading. He was paid a certain amount of money but he claimed more on the ground that although his fees had not been settled, he had worked enough to deserve more remuneration than he had been paid. The defence set up was that although by the law of Quebec the plaintiff was entitled to succeed in his claim, he was not entitled to succeed because by the law of Ontario, the province in which Ottawa the seat of the Government was situated, and by the law of Nova Scotia where the counsel pleaded the case of the Colony, he was not entitled to bring his suit and therefore the suit was not maintainable. The Privy Council pointed out that the defence was not good, for it could not be said that the contract had been made in Ottawa nor could it be said that Nova Scotia was the *locus solutionis*. Then their Lordships pointed out that the question of remuneration was to be settled by the rule prevailing at the place where the counsel *ordinarily* practises. At page 752 their Lordships said: "The right of the respondent to sue for remuneration does not appear to them to depend either upon the law of the place where the employment was given (Ottawa), or upon the

(1) (1884) 9 App. Cas., 745.

law of the locality within which it was to be performed (Nova Scotia). When an advocate or other skilled practitioner is, by law and the custom of his profession, entitled to claim and recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, express or implied, be held to have employed him upon the usual terms according to which such services are rendered." Their Lordships meant to say and did say that the plaintiff, Doutre, practised usually in Quebec, and at Quebec he could recover the fees for his services if the Government of Canada employed him. It employed him on the terms on which an ordinary client at Quebec would engage him for his work at the place. This is the entire decision of the case. In this part of India, an English Barrister does not *ordinarily* practise in England. He cannot rely on English practice.

As to the argument that an English Barrister could not sue for recovery of his fees, their Lordships remarked (at page 751) as follows: "Even if these considerations were admitted, their Lordships entertain serious doubts whether, in an English Colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the Bar alone excepted, can recover their fees by an action at law." This expression of opinion on the part of their Lordships of the Privy Council is not without material bearing in the case before us. Here in the United Provinces, as in Canada, the practitioner is not only an advocate or pleader but is also a solicitor. Their Lordships remarked that in such circumstances, even if the common law of England had been in force in Canada, it was difficult for their Lordships to see how the considerations which prevailed in England and which prevented an English Barrister practising in England

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from suing for his fees could be applied to an advocate who was not only a pure advocate but also combined in himself the functions of a solicitor. This remark entirely demolishes the case of *Smith* v. *Guneshee Lal* (1).

Mukerji, J.

With all respect, I am of opinion that the case of *Queen* v. *Doutre* (2) does not support the view taken by the Full Bench in the case of *Alston* v. *Pitambar Das* (3).

Lastly it was argued that for the last 60 or 70 years (the earliest case seems to be that of *Smith* v. *Guneshee Lal*) the Courts have held that a Barrister of England practising in India as an Advocate of the High Court is incapable of suing or being sued for his fees, and therefore we ought to uphold that decision. Ordinarily, even a wrong proposition of law, if it has long been accepted by the community, may be accepted as a "*communis error*", but the point of law involved is so important that I find myself unable to uphold it on the ground of uniformity in decision alone. If the traditions of the English Bar had been kept up by the Barristers of England practising in India in all or most respects, there would have been some ground for upholding the contention that the error once committed should be perpetuated. But in several respects the traditions of the English Bar are being broken; how, then, can it be expected that only in the case of suits for recovery of fees or for refund of fees the tradition of the English Bar should be maintained? As I have more than once pointed out, in the province of Agra, because of the absence of solicitors, a Barrister sees his client, receives instructions from him, settles his fees, and acts for him. All these are permitted by the rules of the Court which has approved him as a suitable practitioner before it and in the subordinate courts. None of these acts are permissible by the traditions of the Bar in England. How then can it be expected that only in respect of recovery of fees and liability to refund fees the tradition of the

(1) (1871) 3 N.-W. P. H. C. R., 83. (2) (1884) 9 App. Cas., 745.
(3) (1903) I. L. R., 25 All., 509.

English Bar is to be upheld by the courts? I have already pointed out that in England a Barrister is not an officer of the court and is not amenable to its jurisdiction (*vide* article 692, Halsbury's Laws of England, volume 2, second edition). But in the High Court of Allahabad a Barrister-Advocate is as much subject to the disciplinary jurisdiction of the High Court as any other class of practitioners. In the circumstances I find it extremely difficult to hold that a Barrister is not entitled to sue for his fees for acting and pleading as in this case.

Mukerji, J.

The Legal Practitioners (Fees) Act (Act XXI of 1926) has been relied upon as a last resort on behalf of the English Bar as implying that where a Barrister-Advocate agrees only to plead and not to act, he can neither sue for his fees nor be sued for a refund of his fees.

The Legal Practitioners (Fees) Act of 1926 draws a distinction between acting and pleading and lays down the rule that where a legal practitioner agrees to act, whether in a civil or in a criminal case, he can sue for recovery of fees due to him and is liable to be sued for negligence. It is to be noted that the expression "legal practitioner" used in the Act applies to Advocates also, whether they be Barrister-Advocates or non-Barrister Advocates. The definition is the same as in the Legal Practitioners Act of 1879.

If the inference be drawn from the Legal Practitioners (Fees) Act that a legal practitioner who agrees only to plead and not to act for a client cannot sue for his fees, then the disability attaches not only to a Barrister-Advocate but also to a mukhtar and a pleader and a revenue agent. In that case, the special privilege claimed on behalf of an English Barrister practising in these provinces disappears and he stands on the same level as the smallest practitioner, a mukhtar and a revenue agent.

From the mere fact that the Legal Practitioners (Fees) Act confines its provisions to acting it does not follow that it lays down the law that any legal practitioner

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who made a contract with a client to plead only is to be put on the same position as a Barrister practising in England. No attempt need be made to state why the Legal Practitioners (Fees) Act is silent as to the case of a contract to plead only, though it is not difficult to guess the reasons for this omission. By the omission the legislature left the law as uncodified as it was before the passing of the Act of 1926 and did nothing more.

In the case before us the plaintiff agreed both to act and to plead. If we had been obliged to hold that so far as the contract of pleading went the plaintiff was incapable of suing, it would have been necessary perhaps to remit an issue to apportion the stipulated fee between acting and pleading, or possibly the whole suit would have been dismissed. But in the view that I take of the case there is no bar, in law as prevailing in the province of Agra, to prevent the plaintiff from recovering his fees so far as it was to be paid even for pleading for the defendant No. 2.

In the result, I would hold that although the plaintiff is an English Barrister, enrolled by the High Court of Allahabad as an Advocate, he is under no disability to sue his client for professional services done by acting and pleading for him. I would dismiss both the revisions with costs.

KING, J. :—I agree to the conclusions arrived at by the ACTING CHIEF JUSTICE, but, as I view the problem from a slightly different standpoint, I think it better to state my reasons.

The main question is whether a Barrister-Advocate can sue for his fees. The plaintiff is enrolled as an Advocate of this High Court. He has also been called to the Bar in England, and may therefore be called a "Barrister-Advocate" for the sake of brevity. He entered into an agreement with a client. He promised to render certain professional services, namely to appear before the High Court and to present and advocate

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an application for the transfer of a criminal case pending in a Magistrate's court. The client promised to pay for these services at a certain rate. *Prima facie* this was a perfectly valid contract. The plaintiff performed his part of the contract but his client failed to pay the stipulated fees. Hence this suit for compensation for breach of contract.

We first have to see what law is applicable to the facts of the case. In so far as the plaintiff's agreement was to *act* for his client, i.e. to sign and present the application on his client's behalf, I think the case is governed by the Legal Practitioners (Fees) Act, 1926. The plaintiff is an Advocate. Under section 3 of that Act an Advocate who agrees to act for a client may by private agreement settle with his client the fees to be paid for his professional services. Under section 4 the Advocate is expressly entitled to institute legal proceedings for the recovery of any fee due to him under the agreement. The Act applies to every Advocate and I think it is clear that no exception can be made in the case of an Advocate who happens also to be a Barrister. As the Act expressly defines the right of a legal practitioner, including an Advocate, to sue for his fees in certain cases, we are bound to give effect to its provisions if it is applicable, notwithstanding any custom or rule of law to the contrary. It is contended for the defendants that the Act applies only to acting in *civil* proceedings and not in criminal proceedings. The contention is based upon two points. Firstly, that no clear distinction is recognized by the legislature between "acting" and "pleading" in criminal proceedings. This is true, but I do not think the argument is conclusive. The words "act" and "plead" can be given their ordinary meaning with reference to criminal proceedings also. If the plaintiff had agreed only to sign and present the application for transfer I think he might be held to have agreed to "act" only and not to plead. The second point is that section 4 of the Act gives a rule for computing the fee (when it

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has not been fixed by agreement) and the rule applies only to civil proceedings. There is some force in this argument. It is strange that the Act should not make some provision for criminal proceedings, such as stating that the legal practitioner may sue for a fair fee, to be fixed by the court with regard to all the circumstances of the case.

On the other hand it is argued that the language of the Act is wide enough to apply to criminal proceedings also, and that if the legislature had intended to restrict its scope to civil proceedings their intention would have been more clearly expressed. To my mind, this argument is more convincing and I would hold that Act XXI of 1926 governs the case, in so far as the agreement was to act and not to plead, although the question is not free from doubt. Fortunately the point is not of vital importance in the present case. The plaintiff undoubtedly agreed not merely to act but also to plead, i.e. to persuade the High Court to grant the application. Act XXI of 1926 certainly does not establish the plaintiff's right to sue upon his agreement to *plead*, and if that point were decided against him it would be a difficult matter to decide what proportion of his fee was recoverable as being the fee for "acting" only.

We next have to see what law is applicable to the agreement in so far as it was an agreement to *plead*. It may even be conceded, for the sake of argument, that Act XXI of 1926 does not apply to "acting" in criminal proceedings and we must then consider what law applies to the agreement as a whole, leaving that Act altogether out of consideration.

In my opinion the law which the courts are bound to apply is the general law of contract, enacted in the Indian Contract Act, 1872, which extends to the whole of British India. That Act does not profess to be a complete Code dealing with every branch of the law relating to contracts, but it is undoubtedly an authoritative statement of the chief rules relating to the formation,

ratification and discharge of all agreements enforceable by law, and the courts of this province are bound to give effect to its provisions unless good cause to the contrary is shown. This observation might seem superfluous but for the astonishing fact that in the Full Bench case, *Alston* v. *Pitambar Das* (1), the question whether the Indian Contract Act might not apply to a contract entered into in India, and to be performed in India, was not even considered. Now if the agreement in question is viewed in the light of the Contract Act I think it must be admitted that, *prima facie* at least, it fulfils all the requirements of an agreement enforceable by law. Unless some reason can be shown for treating the agreement as void or voidable I think it imposes a legal liability upon the defendant (client).

It is contended for the defendant that the agreement was void because under section 11 the plaintiff was not competent to contract, being disqualified from contracting by a law to which he is subject. The argument is that the plaintiff is a Barrister of England and, as such, he is legally incapable of entering into a contract of hiring for professional services. This legal incapacity is based upon the ancient usage of the Bar in England which has been recognized by judicial decisions of courts in England and has become a rule of common law. The fact that this rule of law is in force in England cannot be questioned, but there are several reasons why it cannot be invoked for the purpose of rendering a Barrister-Advocate incapable of entering into a contract for hiring for professional services in this province.

The suggested incapacity attaches to the plaintiff as a Barrister, not as an Advocate. The short answer is that the plaintiff did not enter into the agreement as a Barrister. He agreed to appear and act and plead in the High Court. He could not have done any of these things as a Barrister. The rules of this High Court

(1) (1903) I. L. R., 25 All., 509.

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are perfectly clear on that point. He could only perform his contract in his capacity as an Advocate. He was therefore engaged as an Advocate. The mere fact that he has been called to the Bar in England does not even entitle him to be enrolled as an Advocate of the High Court. A Barrister of England has to undergo a course of training for a year before he can apply for enrolment. Even then the High Court has absolute discretion to refuse enrolment as an Advocate. Until he has been so enrolled he is not entitled to appear, plead or act for a client in the High Court. It is obvious therefore that the plaintiff entered into the agreement in his capacity as an Advocate and not as a Barrister. The fact that he was a Barrister is no more relevant to the contract than the fact that he was a graduate in law, or a Hindu. It is not suggested that an Advocate is incompetent to contract. As the plaintiff entered into the agreement as an Advocate, the agreement cannot be void on account of the plaintiff's incompetence to contract.

Another answer is that rules of the common law of England are not in force in this province; so, in this province the plaintiff, even in his capacity as a Barrister, cannot be said to be subject to any law which disqualifies him from contracting. To hold that a Barrister in British India is incompetent to enter into a contract for rendering professional services would amount to amending section 11 of the Contract Act by introducing an exception. In other words, it would mean that Barristers must be added (for certain purposes) to the classes of persons, like minors and lunatics, whom the legislature has declared to be incompetent to contract.

A further point, upon which great stress has been laid in arguments, is that the rule of English law, which incapacitates a Barrister from entering into a contract of hiring for professional services, applies only to a Barrister practising according to the usages and traditions of the Bar in England. In this province a

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Barrister-Advocate practises under totally different conditions. For instance, he takes his instructions directly from his client and settles his fees directly with his client. No solicitor intervenes between him and his client. This departure from the usage and *etiquette* of the English Bar is not due to any fault or carelessness on the part of the Barrister-Advocate, but is imposed upon him by necessity, owing to the absence of solicitors. In short, he functions both as Barrister and solicitor. For this reason, the rule of English law cannot apply to him, even if such a rule of law could be considered to have any authority in this province. In *Queen* v. *Doutre* (1) their Lordships expressed serious doubts whether such a rule would be applicable to "a lawyer who is not a mere advocate or pleader and who combines in his own person the various functions which are exercised by legal practitioners of every class in England", even in an English Colony where the common law of England is in force. I think it is clear that a rule of English law, based upon a peculiar usage and etiquette of the Bar in England, has no application to a Barrister-Advocate in this province, even if the courts of this province could recognize the authority of such a rule. As the common law of England is not in force in this province I have, from the outset, found great difficulty in understanding why the rule in question should be held as authoritative and as even overriding the law of the land contained in the Contract Act. We cannot apply the rule mentioned as being a "usage or custom of trade" because every one admits that the profession of a Barrister is not a "trade". Nor can the rule be applied as an incident of a contract not inconsistent with the provisions of the Contract Act. When a Barrister-Advocate settles his fee with his client there is no room for the fiction that he only renders, and professes to render, services of a purely honorary character. Moreover, if it were expressly or tacitly agreed that the

(1) (1884) 9 App. Cas., 745.

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Barrister-Advocate should not sue for his stipulated fee, or be sued for negligence in the conduct of his professional duties, such an agreement would be void under section 28 of the Contract Act.

It has even been argued that an agreement between a Barrister-Advocate and his client for rendering professional services should be treated as void under section 23 on the ground that its object is opposed to public policy. The suggestion is that if such an agreement of hiring were treated as enforceable by law then the Barrister-Advocate would be reduced to the position of a hired servant. I think the suggestion can hardly be taken seriously. Even in England every class of legal practitioners except Barristers can sue for their fees. In this province also every class of legal practitioners, excepting the class of Barrister-Advocates, can undoubtedly sue for their fees. What possible objection can there be to treating Barrister-Advocates like other Advocates in this respect? Members of other professions which are equally honourable, such as medical practitioners, can sue for their fees. I think it is absurd to suggest that Advocates who are not Barristers, and medical practitioners, are reduced to the position of "hired servants" merely because they can sue for their fees and can be sued for negligence. In my opinion considerations of public policy are directly *opposed* to any recognition of the rule in question. If a Barrister-Advocate is not paid for professional services faithfully rendered it is unjust that he should be deprived of a legal remedy. Similarly if the Barrister-Advocate is negligent in the conduct of his professional duties it is unjust that his client should be deprived of a legal remedy. It is unnecessary to labour the point, as the policy of the legislature is apparent from the enactment of section 28 of the Contract Act.

From whatever point of view one considers the question the answer is the same. I think it is clear that in this province a Barrister-Advocate can sue for his fees.

With due deference to the learned Judges who decided the case of *Alston* v. *Pitambar Das* (1), I think the decision was wrong. In my humble opinion they took an erroneous view in assuming that a rule of the common law of England was applicable, and in ignoring the provisions of the Contract Act which is the law of the land, and in failing to observe that the rule is, in any case, only applicable to Barristers practising according to the usage of the English Bar, and not to Barristers who also perform the functions of solicitors. They also failed to appreciate the fact that a Barrister-Advocate in this province renders his professional services as an Advocate and not as a Barrister, and I think they misapplied the ruling in *Doutre's* case (2).

On the other points raised in this application I am in agreement with the ACTING CHIEF JUSTICE and think it unnecessary to state my reasons separately.

YOUNG, J. :—I concur in the judgment of the ACTING CHIEF JUSTICE, and for the reasons given by him. In addition to the examples given in his judgment illustrating the complete difference between the position of a Barrister practising in England and in this province I would add that in England it is unprofessional conduct for a member of the Bar to accept any sum of money other than the fee marked on his brief, nor can he alter the fee so marked after the litigation is ended. In this province a client who succeeds in his suit will often offer a present—or shukrana—to the Advocate. I have yet to learn that such a present is ever refused. That such a practice may affect the position of a Barrister as understood in England —namely that his fee is not to depend on the result of the case—is easily seen.

The short answer to the contention that an Advocate called to the English Bar and practising here carries with him the ancient traditions and customs, rights and liabilities of the English Bar is that if a Barrister practising in England carried on his profession there in the same

(1) (1903) I. L. R., 25 All., 509. (2) (1884) 9 App. Cas., 745.

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way as an Advocate in this province he would certainly be disbarred by his Benchers. That he is not disbarred when practising here is solely due to the fact that his Benchers realise the great difference between conditions in this province and those in England; for example, the General Council of the Bar in England has ruled that a Barrister practising in England may, without the intervention of a solicitor, advise on a case submitted to him by a Colonial Advocate practising in a Colony where the professions of Barrister and solicitor are combined. The Bar Council by this ruling clearly shows that it considers such an Advocate to be more solicitor than Barrister. The annual statement of its proceedings issued by the English Bar Council, which contains rulings on matters of etiquette affecting Barristers, is sent only to those members of the Bar who have an English address in the Law List.

The great difference in the status of the English Barrister and the Barrister-Advocate here is that in England there is a complete division between the two branches of the legal profession. An English Barrister wishing to act as a solicitor must first get himself disbarred. In my opinion it is of the utmost public importance that legal practitioners, where the two branches are combined, should be subject to the ordinary law of tort and be liable to be sued for negligence. Where the two branches are separate, the client is protected against a negligent or inadequate member of the Bar. No solicitor would employ such a Barrister—at least not more than once. Here the instructing client is an ignorant layman, who frequently does not even understand the language in which his case is argued, and whose appreciation of counsel is measured by the time he occupies in court.

I have seen no English authority on this question where the judicial pronouncement is not limited to the case of English Barristers practising in England. It may well be that where the usage of English Barristers practising

abroad is the same as that obtaining in England the same restrictions as in England might be enforced by the courts.

THOM, J. :—I agree with the judgment of KING, J., and have nothing to add.

NIAMAT-ULLAH, J. :—I agree with the views expressed by the ACTING CHIEF JUSTICE and by KING, J., and have nothing to add.

BY THE COURT :—The two revisions are dismissed with costs.

MATRIMONIAL JURISDICTION

Before Mr. Justice Young

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March, 15

CYRIL GIBBS (PETITIONER) *v.* ELLEN GIBBS (RESPONDENT) AND G. D. THORPE (CO-RESPONDENT)*

Divorce—Adultery—Proof—Inference from evidence of opportunity—Presumption—Evidence Act (I of 1872), section 114.

In divorce cases it is not necessary to prove the direct fact of adultery; nor is it necessary to prove the existence of guilty affection in every case. Adultery may legitimately be inferred from evidence of opportunity, where the circumstances are such as would lead a reasonable and just person to the conclusion that adultery had been committed. Section 114 of the Evidence Act authorises such inference or presumption.

So, where the respondent and the co-respondent had gone away from the former's house at Allahabad and lived together in the latter's house at Cawnpore for one week, no one else residing there during that time, and when the husband went there and asked the respondent to come away with him she refused and continued to live in the house alone with the co-respondent for several days more, and no satisfactory explanation was given of these circumstances, it was *held* that although there was no direct evidence of adultery, and no evidence of any guilty affection or undue familiarity between the respondent and the co-respondent, the circumstances could only lead to one inference, that is, that adultery had been committed.

Mr. *H. C. Desanges*, for the petitioner.

Mr. *O. M. Chiene*, for the respondents.

*Matrimonial Suit No. 1 of 1933.

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CYRIL GIBBS v. ELLEN GIBBS

YOUNG, J. :—This is the petition of Cyril Rowland Gibbs of Allahabad praying that his marriage with Ellen Mabel Gibbs should be dissolved and that he should have custody of the child. G. D. Thorpe, a Police Inspector of Cawnpore, has been impleaded as co-respondent. The petitioner alleges the adultery of his wife with Thorpe.

The petitioner married the respondent on the 29th of October, 1928, in Allahabad, where they have lived ever since. They are domiciled in India, and this Court has jurisdiction to hear the petition. There is one son of the marriage at present aged 3½ years.

About the beginning of November, 1932, the husband and the wife were staying with the mother of the latter in Allahabad. The co-respondent was then on leave, and, being an old friend of the family of the wife, came to reside with them for 2½ months. There is no evidence in this case during this time of any undue familiarity or guilty affection between the respondent and the co-respondent. The only evidence that there is is that the co-respondent used to take Mrs. Gibbs out on his motor-bicycle, usually with her own sister, and also to dances in the evening. There is nothing in this to establish guilty affection. On the 9th of January, 1933, the petitioner left for Moradabad to stay with some relatives. Shortly afterwards Mrs. Cearns, the mother of the wife, the wife's sister, and a brother, left Allahabad and went to Moradabad. The petitioner says that when he asked why his wife had not come as well he was told that she had gone to Calcutta to learn nursing. He at once left Moradabad and returned to Allahabad. He then discovered that his wife and the co-respondent had left Allahabad and had gone to Cawnpore. He followed to Cawnpore and found them living together in Thorpe's bungalow. No one else was then residing there. He asked his wife to return with him to Allahabad and she refused. Mrs. Gibbs remained at Cawnpore alone in the bungalow with the co-respondent for one week. Mrs. Gibbs' sister then came from Moradabad and stayed with them. On the

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5th of February the sister left the bungalow and for another four days Mrs. Gibbs and Thorpe were alone together. The sister returned and this curious party remained living together in Cawnpore until shortly before the hearing of this case.

Both the respondent and the co-respondent have been in the box. Mrs. Gibbs says that she left the house in Allahabad when her mother and sister and brother left, because her husband had not left her any money and he had told the co-respondent to look after her. This is unlikely, as the co-respondent had no money and had actually borrowed from the petitioner. She saw no harm, therefore, she says, in going to Cawnpore and staying with the co-respondent alone in his bungalow. She did it deliberately. She further says that they lived in separate rooms at different ends of the bungalow, and she denied adultery. The co-respondent unfortunately tells a different story. He says that Mrs. Cearns left her daughter for one night in Allahabad alone in the house with him because he had to return to duty at Cawnpore the next day and Mrs. Gibbs was to go to Meerut to stay with some friends. He says that Mrs. Cearns told him that as Cawnpore was on the way to Meerut, it would be a good thing if he looked after Mrs. Gibbs as far as Cawnpore. The co-respondent had been on medical leave and was without money. He says that he hoped, when he got to Cawnpore, to draw leave pay which he thought was due to him, and that out of this money he would be able to pay the travelling expenses of Mrs. Gibbs to Meerut. When, however, he reached Cawnpore, he found that he could get no money, and as he was new to Cawnpore and knew nobody there, he could not borrow the money to send Mrs. Gibbs on to Meerut. The only thing left was that he should take Mrs. Gibbs to live with him in his bungalow.

There are three weaknesses about this story. The first is, as I have pointed out above, that it is a completely different story from that of the wife, and, secondly, if

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the story were true, one would have expected an innocent man acting purely as a friend to have written or telegraphed when he got to Cawnpore to the husband for the necessary money to send Mrs. Gibbs on to Meerut. The co-respondent, however, did not do this. He could not explain why he did not communicate with the petitioner. Lastly, Mrs. Gibbs could easily have borrowed money from her aunt who lived opposite Mrs. Cearns' house in Allahabad. Further, when a couple of days later the husband arrived at Cawnpore and demanded his wife, there was no question of asking the husband for necessary funds to send his wife to Meerut. In fact, Thorpe did nothing to assist the husband in his desire that his wife should return with him to Allahabad.

These are the facts. I am asked by counsel for the petitioner to infer that adultery has been committed. On the other hand, counsel for the wife contends strongly that mere evidence of opportunity is not enough, there being no evidence of any guilty affection or undue familiarity between the respondent and the co-respondent. It is not necessary to prove guilty affection in every case. Adultery for instance may be committed with a prostitute and there are the well known cases where divorces are granted on "hotel evidence". There is an old legal maxim in Scotland which runs as follows: "*Solus cum sola in suspecto loco non presumitur dicere pater noster*", which being translated means that when a man and a woman are found together under suspicious circumstances, it cannot be presumed that they are saying their prayers. I am satisfied that on the authorities both in India and in England, circumstances of this sort can only lead to one inference, that is, that adultery has been committed. To rule otherwise would be an extremely dangerous precedent.

Section 114 of the Evidence Act enacts that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events and human conduct. It seems to

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me that any reasonable person, on the facts of this case, must come to the conclusion that the respondent and the co-respondent committed adultery in the latter's bungalow in Cawnpore. Sir William Scott many years ago in England laid down this principle: "It is a fundamental rule that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were held, no protection whatever could be given to marital rights. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion." When one considers in this case not only the fact that the respondent and the co-respondent stayed together for this long time alone in the bungalow in Cawnpore, but also that the husband came to bring his wife back and she refused to return; the fact that no attempt was made by the co-respondent to obtain the money necessary for the wife's journey either to Meerut or back to her husband at Allahabad, and the fact that the wife's story of how she came to go to Cawnpore so completely differs from that of the co-respondent's, it is impossible to avoid the conclusion that the reason for this state of affairs was that there was guilty affection. This, coupled with the ample opportunity afforded by being alone in the bungalow, must lead, in my opinion, any reasonable person to the necessary conclusion that adultery had been committed.

Counsel for the wife, however, relies strongly on the recent case of *Farnham* v. *Farnham* (1), decided by Lord MERRIVALE, the President of the Divorce Division in London. He held that the Court was not bound to infer adultery from the evidence of opportunity alone. Lord

(1) (1925) 133 L. T., 320.

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MERRIVALE in that case declined to grant a divorce on the usual hotel evidence which now it is customary to give in divorce cases in England. He refused to infer from the fact that a man and a woman had stayed the night together in a bedroom in hotel that adultery had been committed. That, however, is a very different case from this. Everyone knows that as the divorce law is that a husband and wife, however much they disagree, should be bound together, unless adultery is proved, married people wishing to separate arrange for some woman to go to an hotel with the husband. The man and woman register themselves as husband and wife in the hotel books, occupy the same bedroom, and in the morning ring the bell for the maidservant to bring tea. The maidservant provides the necessary evidence that she has seen the man and woman together in bed. It is a well known fact, however, that in many cases the only time that the man and woman are in bed together is when the maidservant comes into the room. The man may not have the slightest intention of committing adultery, but only goes through this farce in order to deceive the court and so enable his wife to obtain a divorce. This being the well known state of affairs, it is not surprising that the learned President of the Divorce Division refused to infer adultery from these facts. Here the facts are entirely different.

Adultery, then, in my opinion, having been proved, there will be a decree *nisi* with costs against the co-respondent. The husband will have the custody of the child. I have no doubt he will make arrangements for his wife occasionally to have access to the child.

REVISIONAL CRIMINAL

Before Mr. Justice Kendall

EMPEROR *v.* MUNSHI LAL*

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March, 15

Municipalities Act (Local Act II of 1916), *sections* 2, 186—"*Building*"—*Chabutra with temporary awning or shed over it—Municipalities Act (Local Act II of* 1916), *section* 307—*Continuing breach—Daily fine imposed in anticipation at the time of first conviction.*

A masonry-work chabutra with a *pal* or shed over it, even though the latter may be of a temporary character, comes within the definition of a building in section 2 of the Municipalities Act. The putting up of a *pal* or shed, though not of a permanent character, on poles driven into a masonry-work chabutra amounts at least to "altering part of a building", if not to actually "erecting a building", within the purview of section 2.

A Magistrate, when convicting under section 307(2) of the Municipalities Act for non-compliance with a notice issued by the Municipal Board for the removal of a building, sentenced the accused to a fine of Rs.10 and to a further fine of Re.1 per day for such time as he might continue the breach. *Held*, that the order of daily fine, passed in anticipation of continuing breach, was illegal. Further proceedings had to be taken in case the breach was continued, and upon such second conviction a fine, calculated at the maximum rate of Rs.5 per day of the actual period of persistence in the breach, could be imposed.

Mr. *Kartar Narain Agarwala*, for the applicant.

Mr. *K. Verma*, for the opposite party.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

KENDALL, J.:—This is a reference made by the Additional Sessions Judge of Aligarh with the recommendation that the order of conviction passed by a Magistrate under section 307 of the United Provinces Municipalities Act, 1916, be quashed. The applicant, whose application has been approved by the Additional Sessions Judge, is in possession of one of the plots which

*Criminal Reference No. 878 of 1932.

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have been leased out by the Municipal Board of Etah on payment of *tahbazari* or ground cess from day to day. On this plot there is a chabutra which has either been built by the applicant or, as he contends, has been standing on the plot for some years. Neither of the courts has come to a definite decision on the question of whether the chabutra itself, which is a masonry construction, is an old or a new one; but the reason why the Board took action was that he recently set up a shed on the chabutra, and the Board therefore issued a notice to him under section 186 of the Act on July, the 7th, 1932, to remove the chabutra and the shed. He did not do so, and he was therefore prosecuted and fined under section 307 of the Act.

One of the points to which the Judge has referred, and which has been pressed in argument before me, is that as the Board sent to the applicant a second notice on July, the 16th, directing the applicant to quit the land, it had waived the first notice of July the 7th. I have not, however, been able to understand how the second notice could operate as a waiver, for it appears to deal with a separate and distinct matter. The applicant, as I have said, was in possession of the plot on payment of *tahbazari* dues. He might be able to remain in possession of the plot even if he had to remove the chabutra, and although the Board may have issued a notice to him to quit on account of his failure to comply with their direction to remove the chabutra, it does not appear to me that by directing him to quit the Board waived their right—if indeed such a right exists—to have the chabutra removed.

The real crux of the problem is whether the chabutra with the shed erected on it is a "building" as defined in section 2 of the Act. The notice given by the Board was issued under section 186, under which it has authority to direct the owner or occupier of any land to "stop the erection, re-erection or alteration of a building or

part of a building . . . in any case where the Board considers that such erection, re-erection, alteration, construction or enlargement is an offence under section 185, and may in a like manner direct the alteration or demolition, as it deems necessary, of a building, part of a building or construction as the case may be." It has not been suggested that, if the construction is a building, the Board was not justified in considering that the erection or alteration, etc., was an offence under section 185, but it has been strongly contested that the construction is not a building.

A building is defined in section 2 of the Act as "a house, hut, shed or other roofed structure for whatsoever purpose and of whatsoever material constructed, and every part thereof, but shall not include a tent or other such portable and merely temporary shelter." The Magistrate, without considering in great detail the definition of the word "building", held that as the applicant was only entitled to possession of the plot from day to day, he had no right to execute a work of a permanent character, and that as he had been repairing the chabutra and had put a shed upon it, he certainly had been executing a work of a permanent character. The Judge, on the other hand, held that "the mere putting of *pal* for temporary shelter from the sun would not make it a shed or a building." No doubt there is support for the view that a temporary protection against heat or rain is not a building, in the decision of Sir GEORGE KNOX in the case of *Kamta Nath* v. *Municipal Board of Allahabad* (1). The question here, however, is not only whether the construction which has been put on the chabutra by way of a roof is a building, but whether the permanent chabutra itself with a roof upon it comes within the definition of a building in the Act. That definition, as Mr. *Kamla Kant Verma* has pointed out, shows that the legislature had in mind two things, (1) the permanence or otherwise of a structure and (2) the roof. Now, it is

(1) (1905) I. L. R., 28 All., 199.

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not denied that the chabutra itself is a permanent structure. It is certainly not a "tent or other such portable and merely temporary shelter" and the only reason that could be urged for holding that the chabutra is not a "building" is that it has not or had not a roof. The applicant, however, himself supplied the deficiency by setting up a roof thereon. The roof itself may not be of such a permanent nature as the chabutra, though I am informed that it is set up on poles which have been driven firmly into the chabutra. So long, at any rate, as the roof exists, it appears to me quite clear that the chabutra with the roof must be held to come within the definition of a building, and indeed that seems to have been the view taken by the advisors of the Municipal Board, because they do not seem to have taken any step against the applicant until he set up the roof. In my opinion therefore the decision of the Magistrate on this point is correct.

It has further been suggested that the Board had no right to issue a notice under section 186 because the applicant was not erecting or re-erecting the chabutra; but by setting up the roof it appears to me to be perfectly obvious that he was at least altering part of a building, if he was not actually erecting a building by setting up the roof on the chabutra.

There is, however, one part of the application on which the applicant is entitled to succeed. The Magistrate not only fined the applicant Rs.10 under section 307 of the Act and ordered him to remove the shed and the chabutra within ten days, but added that "failing to do it he shall pay a further fine of Re.1 per day until such time as he continues the breach." As the Judge has rightly pointed out, it has been held in the case of *Emperor* v. *Amir Hasan Khan* (1) that "The liability to a daily fine in the event of a continuing breach has been imposed by the legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board may not claim to have purged his offence once and for all by

(1) (1918) I. L. R., 40 All., 569.

payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability will require to be enforced, as often as the Municipal Board may consider necessary, by the institution of a second prosecution, in which the questions for consideration will be, how many days have elapsed from the date of the first conviction under the same section during which the offender is proved to have persisted in the offence and, secondly, the appropriate amount of the daily fine to be imposed under the circumstances of the case, subject to the prescribed maximum of Rs.5 per diem."

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I therefore accept the reference to this extent that the order of the Magistrate in inflicting a further fine of Re.1 per diem is set aside, but for the rest the Magistrate's order is maintained and the reference is rejected.

APPELLATE CRIMINAL

Before Mr. Justice Young and Mr. Justice Rachhpal Singh

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March, 20

EMPEROR *v.* IRSHAD ULLAH KHAN AND OTHERS*

Indian Penal Code, sections 34, 302—*Death caused by one out of several persons having a common intention—Common intention to attack a party and prevent irrigation of field—One member, armed with a gun, of the attacking party causing death by shooting—Liability of other members.*

The view that section 34 of the Indian Penal Code applied only where a criminal act was done by several persons of whom the accused charged thereunder was one, and not where the act was done by a person other than the latter, is not a correct view. Section 34 is applicable equally to those cases in which the criminal act done in furtherance of a common intention of several persons is the act of a single individual. Of course, before section 34 can be applied, the prosecution must prove that the criminal act was done by one of the accused persons in furtherance of the common intention of all. The existence of a common intention is the sole test of the joint responsibility under section 34 of the Indian Penal Code.

*Criminal Appeal No. 952 of 1932, from an order of Joti Sarup, Sessions Judge of Bulandshahr, dated the 14th of October, 1932.

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Where a party of men set out towards a field, with the common intention of attacking another party of men and preventing them from irrigating the field from a well, and one of the attacking party had a gun and the others had lathis, and all of them attacked the other party with the result that two persons died of gunshot wounds and others received different injuries, it was *held* that section 34 of the Indian Penal Code applied and all the participants in the attack could be convicted under section 302 of murder.

Messrs. *P. L. Banerji*, *Kumuda Prasad* and *Kazi Masud Hasan*, for the appellants.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

YOUNG and RACHHPAL SINGH, JJ. :—Irshad Ullah Khan, Rashid Ullah Khan, Tufail Ahmad Khan, Nisar Khan, Fida and Kaley were tried in the court below under sections 302, 148 read wth section 149 and section 307, of the Indian Penal Code. Fida and Kaley have been acquitted. The charge of rioting under section 148 of the Indian Penal Code failed. Irshad Ullah Khan has been found guilty under section 302 of the Indian Penal Code and has been sentenced to death. Rashid Ullah Khan, Tufail Ahmad and Nisar Khan have been held guilty under section 302 read with section 34 of the Indian Penal Code and have been sentenced to transportation for life. All these four accused have also been convicted under section 307 of the Indian Penal Code, and have been sentenced to 7 years' rigorous imprisonment. They have all preferred appeals against their convictions, and the record of the case has been sent up by the learned Sessions Judge for confirmation of the death sentence passed against Irshad Ullah Khan.

Irshad Ullah Khan and Rashid Ullah Khan are brothers. A cousin of theirs is married to Tufail Ahmad Khan. Nisar Khan is said to be a grand-nephew of Tufail Ahmad Khan accused. Ahmad Ullah Khan was the father of Irshad Ullah Khan and Rashid Ullah Khan. He is dead. Musammat Nazir Begam is the stepmother. About 10 bighas of land in village Bagrasi is

held by Musammat Nazir Begam as mortgagee in possession since 1915. This land was in the cultivatory possession of Ram Sarup and his brother Heta as occupancy tenants. It is said that the land remained *parti* for about 2 years. Musammat Nazir Begam leased it to Abdul Majid Khan and his nephew Asad Ullah Khan under a lease executed on the 10th of May, 1932. On the same date Heta and Ram Sarup relinquished this land in the presence of a kanungo.

The evidence produced in the case shows that Irshad Ullah Khan accused obtained an *ex parte* decree in respect of this land against his step-mother. On the date on which the lease was executed in favour of Abdul Majid Khan and Asad Ullah Khan an application was made to the court of the Munsif for setting aside the above-mentioned *ex parte* decree.

It appears from the evidence on the record and from the statement of Musammat Nazir Begam that her relations with Irshad Ullah Khan and his brother Rashid Ullah Khan had been very strained. After the death of her husband these two step-sons used to look after this leased land, but Musammat Nazir Begam did not get any profits and so she leased the land to Abdul Majid Khan and Asad Ullah Khan for a number of years.

The prosecution story is that Abdul Majid Khan had made arrangements to have one of the leased plots irrigated on the 1st of June, 1932. This plot is at a distance of only 80 or 90 yards from his residential house. Some labourers had assembled at the well near the field and irrigation work had started on the morning of 1st of June, 1932. The evidence is that Abdul Majid Khan, Muhammad Said Khan, P. W. 2, and Said Khan were sitting on a chabutra in front of the house of Abdul Majid Khan. They saw all the accused proceeding in the direction of the field which was being irrigated. Irshad Ullah Khan carried a double-barrelled breech-loading shot gun and Rashid Ullah Khan had a spear, while the remaining accused were armed with lathis. A servant

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of Abdul Majid Khan told him that the party of the accused was going towards the well. Upon this Abdul Majid Khan, Said Khan deceased and Said Khan, P. W. 2, followed them. Abdul Majid Khan called the accused and asked them to stop and requested them not to go to the well. It may be remarked here that Abdul Majid Khan was unarmed. All the six accused turned back and Tufail Ahmad Khan asked his companions to beat Abdul Majid Khan and his companions. Upon this Irshad Ullah Khan fired his gun at Abdul Majid Khan. Abdul Majid Khan fell down upon the ground wounded. Then Said Khan deceased rushed towards Irshad Ullah Khan and gave him a lathi blow on the head. Irshad Ullah Khan again fired and Said Khan was hit. He fell down upon the ground and died. Muhammad Said Khan, P. W. 2, says that the other five accused beat him with lathis. He had a lathi and he also hit back. In the meantime Umar Khan and Rab Nawaz Khan came to help Abdul Majid Khan's party. Irshad Ullah Khan rushed towards Rab Nawaz Khan and fired at him. Rab Nawaz Khan fell down wounded. Umar Khan is the father of Said Khan, P. W. 2. He asked the accused persons to cease fighting. But this had no effect and Umar Khan was also beaten by all the accused except Irshad Ullah Khan. Irshad Ullah Khan also fired at Said Khan witness and he was also wounded. One Sarjit, a labourer who had been working at the well, came and caught Irshad Ullah Khan from behind. He was pushed back. Irshad Ullah Khan fired at him and he was also wounded. Jagwa another labourer who happened to be near Sarjit also received gunshot injuries. After this the fight ceased and eventually all the wounded men were taken to Bulandshahr. Abdul Majid Khan died in the hospital on the 6th of June, 1932. One of the arms of Sarjit had to be amputated. Rab Nawaz Khan was undergoing treatment in the hospital in Bulandshahr at the time of the trial.

* * * * *

We have given our anxious consideration to the evidence produced on both sides. We feel satisfied that the evidence of the prosecution witnesses is true and has been rightly believed by the learned Sessions Judge. We have the dying declaration of Abdul Majid Khan, which was recorded by a Magistrate on the evening of the 1st of June, 1932. The man was seriously wounded and we cannot believe that he told a story which was not true. According to the evidence produced by the defence, Abdul Majid Khan was held in high esteem by everyone of Bagrasi village, and he was obviously a man of high character. He was an old man of over 60. The evidence proves that he was unarmed. We cannot believe that he ordered his companions to beat Irshad Ullah Khan who was armed with a double-barrelled gun. We bear in mind that on the side of the defence no report was made giving their version of the fight. We do not believe Ram Sarup when he says that he was irrigating one of the leased plots on the 1st of June, 1932. It is the case of both sides that Abdul Majid Khan had gathered some men in the morning of the 1st of June, 1932, at his place. The prosecution case is that these men had already gone and had started irrigation work at the well. The defence is that Ram Sarup and some of his men were irrigating the disputed plot. The story of the defence appears to be improbable. If Abdul Majid Khan had gathered men for irrigation, then it is highly improbable that he could have allowed Ram Sarup to start the work. The well is only at a distance of 80 yards from his house. There could be no reason for him to keep his labourers whom he had collected at his own house. We are of opinion that Irshad Ullah Khan resented the action of Abdul Majid Khan in taking lease of the land from his step-mother. That was the cause of the trouble. In our opinion the prosecution evidence that Irshad Ullah Khan and his companions were going to stop Abdul Majid Khan from

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proceeding with the irrigation work is true. The story of Irshad Ullah Khan that Abdul Majid Khan wrongly suspected that he was backing Ram Sarup does not appear to be true. The evidence clearly proves that on the 10th of May, 1932, both Ram Sarup and his brother Heta relinquished the land. The defence has invented the story that Ram Sarup had determined not to give up possession. The dying declaration of Abdul Majid Khan strongly supports the oral evidence of the eye-witnesses. We, therefore, believe the prosecution story and hold that it is proved that Irshad Ullah Khan was going to the well to stop the irrigation.

So far as Irshad Ullah Khan is concerned, we are of opinion that a clear case of murder has been established against him. We also think that the charge under section 307 of the Indian Penal Code is proved.

Now we turn to the case of the remaining three appellants. We believe that these men were with Irshad Ullah Khan. The evidence of Muhammad Said Khan, P. W. 2, proves that when Abdul Majid Khan followed the party of Irshad Ullah, he asked them to stop and not to go to the well. On this Tufail Ahmad Khan asked his companions to beat Abdul Majid Khan and the men who were with him. Then Irshad Ullah fired. We have also the dying declaration of Abdul Majid Khan on this point. He says that Tufail Ahmad Khan said that before going to the well they should deal with Abdul Majid's party. The words used in the dying declaration are "*Inko bhi lelo*". The evidence further proves that Rashid Ullah Khan, Tufail Ahmad Khan and Nisar Khan used their lathis. Muhammad Umar Khan who had come with Rab Nawaz Khan to help Abdul Majid Khan was beaten and received lathi injuries.

On behalf of Nisar Khan *alibi* evidence was produced. * * * * * We are satisfied that the defence of Nisar Khan is not true. We hold that all

these three appellants (appellants Nos. 2 to 4) took part in the fight.

The learned counsel for the appellants has contended that Rashid Ullah Khan, Tufail Ahmad Khan and Nisar Khan have been wrongly convicted under sections 302 and 307 read with section 34 of the Indian Penal Code. His argument is that section 34 of the Indian Penal Code has no application to this case.

Section 34 of the Indian Penal Code lays down that when a criminal act is done by several persons, in furtherance of the common intention of all, each of those persons is liable for the act in the same manner as if it were done by him alone. The apparent simplicity of the language of this section has been found to be delusive. There are few other sections of the Indian Penal Code in the interpretation of which there has been so deep a divergence of opinion in all the High Courts in India as in the case of section 34 of the Indian Penal Code. In *Emperor* v. *Nirmal Kanta Roy* (1), STEPHEN, J., held that section 34 of the Indian Penal Code applied only where a criminal act was done by several persons of whom the accused charged thereunder was one, and not where the act was done by some person other than the latter. In that case, two persons had fired at another. Only one hit the victim who was killed. The accused had not hit the deceased. STEPHEN, J., held that the accused could not be convicted under section 302 read with section 34 of the Indian Penal Code. This view is no longer good law. A Full Bench of the Calcutta High Court held in *Emperor* v. *Barendra Kumar* (2) that if several persons armed with pistols go to a place with the common intention of robbing a person and, if necessary, to kill him, and if one of them fires a fatal shot in furtherance of their common

(1) (1914) I. L. R., 41 Cal., 1072. (2) (1923) 81 Indian Cases, 353.

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intention, then all of them are guilty of murder under section 302 read with section 34 of the Indian Penal Code. In this case the ruling in *Emperor* v. *Nirmal Kanta Roy* (1) was considered and not approved. The case of *Emperor* v. *Barendra Kumar* (2) went in appeal to the Privy Council. The judgment is re-reported in *Barendra Kumar Ghosh* v. *Emperor* (3). Their Lordships held that "section 34 of the Indian Penal Code deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself." " 'That act' and then again 'the act' in the latter part of the section must include the whole of the action covered by 'a criminal act' in the first part of the section." In the case of *Emperor* v. *Barendra Kumar* (2) RICHARDSON, J., who was one of the five Judges, made the following observations at page 404: "Prove the common intention of the persons present at the commission of the offence and all would be equally guilty of nothing less than that offence. If death were the result of the act or series of acts of one out of several confederates, the act would be done by them all within the meaning of section 34. If death followed the different acts of different confederates at the same time and place, then again section 34 would probably suffice. Every confederate would be regarded as having done every criminal act and would, therefore, be liable as if he had done them all alone."

In another case, *Emperor* v. *Ranchhod Sursang* (4), it was contended on behalf of the accused that section 34 of the Indian Penal Code was not applicable to a case where a criminal act in furtherance of the common intention of several persons was the act of a single individual. A Bench of two learned Judges of the

(1) (1914) I. L. R., 41 Cal., 1072.
(2) (1923) 81 Indian Cases, 353.
(3) (1924) I. L. R., 52 Cal., 197.
(4) (1924) I. L. R, 49 Bom., 84.

Bombay High Court repelled this contention. They held that the fact that a criminal act done in the furtherance of the common intention of several persons was the act of a single individual does not render the provisions of section 34 inapplicable. Dealing with the view taken by STEPHEN, J., in the case of *Emperor* v. *Nirmal Kanta Roy* (1) and with another Calcutta case, *Emperor* v. *Profulla Kumar* (2), the following observations were made: "The learned Judges, however, seem to have overlooked section 9 of the Indian Penal Code which in my opinion would have removed the difficulty felt by STEPHEN, J. Section 9 runs as follows: 'Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.' If we then turn to section 34 and read it in the light of section 9, we can interpret it as follows: 'When a criminal act is done by one or more persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.' "

On a consideration of the authorities on the point we agree with the view taken in the Full Bench case of the Calcutta High Court in *Emperor* v. *Barendra Kumar* (3) and in *Emperor* v. *Ranchhod Sursang* (4). In our judgment the view that section 34 applied only where a criminal act was done by several persons of whom the accused charged thereunder was one, and not where the act was done by a person other than the latter, is not a correct view. We are of opinion that section 34 of the Indian Penal Code would be applicable equally to those cases in which the criminal act done in furtherance of a common intention of several persons is the act of a single individual.

Before section 34 can be applied, the prosecution must prove that the criminal act was done by one of

(1) (1914) I. L. R. 41 Cal., 1072.
(2) (1922) I. L. R., 50 Cal., 41.
(3) (1923) 81 Indian Cases, 353.
(4) (1924) I. L. R., 49 Bom., 84.

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the accused persons in the furtherance of the common intention of all. The existence of a common intention is the sole test of the joint responsibility under section 34 of the Indian Penal Code. There are very few cases in which there is direct evidence of common intention. This must be gathered from the facts of each case and the surrounding circumstances. In this case we have no difficulty in determining the common intention of the accused persons. We find that it is established that Abdul Majid Khan was having one of the leased plots irrigated. Appellants Nos. 1 to 4 were seen going towards the well when Abdul Majid Khan and his two companions (Said Khan deceased and Said Khan P. W. 2) followed them and Abdul Majid Khan asked them to stop. According to the dying declaration of Abdul Majid Khan which we believe, Tufail Ahmad Khan asked Irshad Ullah Khan to deal with Abdul Majid Khan before going to the well. Upon this Irshad Ullah Khan fired at Abdul Majid Khan and appellants Nos. 2 to 4 joined the attack by using their lathis. What Tufail Ahmad Khan said to Irshad Ullah clearly shows that the common intention was to beat Abdul Majid and his men and to prevent him from irrigating one of the fields leased to him. Then, as pointed out by the learned Government Advocate, there is another point which shows the common intention of the appellants. When Irshad Ullah Khan fired at Abdul Majid Khan and wounded him, the other three accused made no attempt whatsoever to stop Irshad Ullah Khan from using his gun any further. On the other hand, they themselves started beating the men in the party of Abdul Majid Khan who had come to render help. We believe further that Irshad Ullah Khan was carrying a gun not for the purpose of shooting pigeons [which was the defence story] but to use, if necessary, to stop the irrigation. All the accused must have known that the gun might be used. On these facts we are of opinion

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that section 34 of the Indian Penal Code is clearly applicable to the case of the appellants Nos. 2 to 4. For these reasons we hold that they had been rightly convicted by the court below.

The appeals of all the appellants are dismissed. We confirm the death sentence passed upon Irshad Ullah Khan and direct that it be carried out according to law. As regards the sentences against appellants Nos. 2 to 4 we direct that the sentences under section 307 will run concurrently with those under section 302 read with section 34 of the Indian Penal Code.

Before Mr. Justice King and Mr. Justice Iqbal Ahmad

1933
March, 27

EMPEROR *v.* SHIB LAL*

Indian Penal Code, sections 97, 99 *and* 326—*Right of private defence of property against illegal attachment—Attachment of property under an invalid warrant—Does not amount to theft or robbery—"Good faith".*

Although an attachment of property made by an amin and his party under a time-expired warrant of attachment is illegal, such attachment does not amount to an offence of theft or robbery, there being no dishonest intention of causing wrongful gain or wrongful loss to any person; and no question of mischief or criminal trespass arises in such a case. Therefore, upon such attachment there is no right of private defence of property under the terms of section 97 of the Indian Penal Code.

If, however, a right of private defence of property had accrued in such a case, it would not have been taken away by section 99 of the Indian Penal Code, as the amin, in acting under a time-expired warrant, could not be deemed to have acted "in good faith", as defined in the Indian Penal Code.

Where an amin with a party of constables, mukhia and patwari went to a village to make an attachment, but the warrant had become invalid by lapse of the time limited thereby, and the owner of the property resisted and caused grievous hurt to one of the party, it was *held* that he could not plead any right of private defence of property and was rightly convicted under section 326 of the Indian Penal Code.

*Criminal Appeal No. 767 of 1932, by the Local Government, from an order of K. N. Wanchoo, Sessions Judge of Muttra, dated the 8th of July, 1932.

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The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Mr. *Debi Prasad*, for the accused.

KING and IQBAL AHMAD, JJ.:—This is an appeal by the Local Government against the acquittal of one Shib Lal, who was convicted by a Magistrate of the first class under section 326 of the Indian Penal Code, but was acquitted on appeal by the learned Sessions Judge.

The facts of this case are practically undisputed. An extra amin named Karan Behari Lal went to the village of Nandgaon on the 18th of February, 1932, for the purpose of collecting certain arrears of canal dues from Shib Lal and others. As he apprehended resistance, he took with him two constables, named Pohap Singh and Manzur Ahmad, in addition to his peon Kadir Bakhsh. On arrival at the village he was joined by Parshadi Lal, patwari, and Ajairam, the mukhia of the village, and another man. In all there were seven persons of the amin's party including himself. When the party reached Shib Lal's house the amin sent for Shib Lal and showed him the warrant of attachment and demanded payment of the arrears due. Shib Lal refused to pay and also stated that he would not allow his property to be attached. Thereupon the amin ordered the attachment of Shib Lal's buffalo. The amin's peon and Pohap Singh, constable, advanced to seize the buffalo. Then Shib Lal and some men with him began to throw bricks at them, and Shib Lal, who had a sword, struck the constable Pohap Singh a severe blow upon the arm wounding him grievously. Other villagers came to the help of the amin's party, whereupon Shib Lal and the others ran away.

Shib Lal admitted that the amin, together with his peon, the constables and others, went to his house on the day in question, but he denied that any warrant of attachment was shown to him and denied that the

amin made any demand for payment of arrears. He said that they tried to catch him, whereupon he told them to leave him alone. He admits that when the constable Pohap Singh advanced to seize the buffalo, he struck Pohap Singh a blow with his sword.

The learned Sessions Judge has accepted the facts stated by the prosecution witnesses but has acquitted the accused on the ground that the warrant of attachment was invalid and that the amin's procedure in attaching the property under an invalid warrant was illegal and that Shib Lal was justified in the exercise of the right of private defence of property in treating the amin and his party as robbers and in resisting the attachment of the buffalo by force. The learned Government Advocate has argued that the view taken by the learned Sessions Judge regarding the exercise of the right of private defence in the circumstances of this case was erroneous.

In our opinion, the learned Sessions Judge was wrong in holding that the amin and his party could justifiably be treated as robbers. It is conceded by the prosecution that the warrant for the attachment of Shib Lal's property was invalid on the 18th of February. The warrant had been issued on the 11th of January and was valid for fifteen days only and had therefore expired on the 26th of January. It is admitted, therefore, that the warrant had no force on the 18th of February. On this admission we think it would be difficult to hold that the accused was deprived of the right of private defence by reason of the provisions of section 99 of the Indian Penal Code. Under that section he would not have the right of private defence if the seizure of the buffalo was done or attempted to be done by the amin acting in good faith under colour of his office. As the duration of the warrant had admittedly expired, it must be conceded that the amin was negligent in failing to observe that the duration of the warrant had expired and that it

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was no longer in force. The amin was obviously acting "in good faith" in the *popular* sense of that expression, because there is no suggestion that he was actuated by any malice or that he had any dishonest intention. The expression "in good faith" is, however, used in the Penal Code in a very special sense, and we doubt whether it could be held that the amin acted with due care and attention in the exercise of his duties when he admittedly failed to look at the date of his warrant and to observe that its period had expired.

It is, however, for the accused to show that he was justified in inflicting such a serious injury upon the constable in the exercise of the right of private defence of property. Unless the accused can show that he had a right of private defence under section 97, it is unnecessary to consider to what extent and subject to what restrictions the right could be exercised. Under section 97 the accused had a right, subject to the restrictions contained in section 99, to defend his property against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or is an attempt to commit any of those offences. No question of mischief or criminal trespass arises. We only have to consider the question of theft or robbery.

In the circumstances of the present case we think it is quite apparent that the amin had no intention of committing theft because he had no dishonest intention. He was negligent in failing to observe that his warrant was no longer in force, but he clearly did not intend to cause wrongful gain to any person or wrongful loss to any person. Therefore, he cannot be held guilty of committing theft or of attempting to commit theft by ordering the attachment of the buffalo. As he could not be held guilty of committing theft, it follows that he could not be held guilty of committing robbery. We dissent from the view taken by the learned Sessions Judge on this point. He

seems to think that as the amin and his party were armed with lathis and proceeded to seize the buffalo belonging to the accused and as their action was not strictly warranted by law, they must be held to be guilty of robbery. The learned Sessions Judge is wrong in failing to observe that a man cannot commit robbery unless he acts with dishonest intention. In this case a dishonest intention is conspicuously wanting on the part of the amin and also of his party. We may note that the accused himself has never suggested that he believed the amin and the persons with him to be thieves or robbers or that he believed that they were acting with any dishonest intention. The party came to his house in broad daylight, he knew that Karan Behari Lal was an amin, and he was accompanied by two constables, by the mukhia and by the patwari of the village. It must have been obvious to the meanest intelligence that the party did not come as a band of robbers or thieves, and the accused does not even suggest that he believed them to be robbers or thieves. He did not even notice any defect in the warrant of attachment. In such circumstances we hold that the accused had no right of private defence of his property under section 97. It would indeed be a strange state of things if an amin, who through inexperience or negligence failed to notice that the duration of his warrant had expired but who proceeded to attach property honestly believing that he was entitled to do so under the warrant, could be treated as a robber and could be grievously hurt or even killed by the owner of the property in justifiable exercise of the right of private defence.

We set aside the order of acquittal and restore the order of conviction and the sentence passed by the learned Magistrate.

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REVISIONAL CIVIL

Before Mr. Justice Kisch

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March, 28

SARJU RAM SAHU (APPLICANT) *v.* PARTAP NARAIN AND OTHERS (OPPOSITE PARTIES)*

Civil Procedure Code, sections 63 and 73—Rateable distribution—Property attached by a superior as well as an inferior court—Sale by superior court—Application for rateable distribution made to the superior court without getting the decree transferred to it or applying for execution—Rateable distribution allowed.

Assets were realised in the court of a Subordinate Judge by the sale of property which had been attached in execution of a decree of that court. Other persons, who held decrees of the Munsif's court, had also attached the same property in execution of their decrees, but under section 63 of the Civil Procedure Code the sale had to be held by the superior court, and they applied in the court of the Subordinate Judge, before assets had been realised, for a rateable distribution. They however, had not got their decrees transferred to the court of the Subordinate Judge nor had they made any formal application for execution in that court. *Held* that the holders of the decrees of the inferior court were entitled, under section 73 read with section 63 of the Civil Procedure Code, to a rateable distribution without getting their decrees transferred to the superior court or formally applying for execution in that court.

Mr. *Harnandan Prasad*, for the applicant.

Mr. *Shiva Prasad Sinha*, for the opposite parties.

KISCH, J. :—These are decree-holder's applications directed against an order of the Subordinate Judge of Basti, allowing the opposite parties rateable distribution.

The applicant Sarju Ram Sahu had obtained a decree against his judgment-debtor in the court of the Subordinate Judge. On the 7th of February, 1930, he attached certain property belonging to the judgment-debtor and this property was eventually sold and the proceeds deposited in the Subordinate Judge's court.

*Civil Revision No. 710 of 1932.

The opposite parties had also obtained decrees against the same judgment-debtor in the court of the Munsif and had attached the same property on the 15th of February, 1930. As under section 63 of the Code of Civil Procedure, where the property has been attached in execution of decrees of several courts the property must be realised by the court of the highest grade, the decree-holders in the Munsif's court applied to the Subordinate Judge's court that they be given a rateable share out of the sale proceeds of the property attached by them. They did not get their decrees transferred to the court of the Subordinate Judge, nor did they make any formal application for execution in that court. The applicant contested the right of the opposite parties to rateable distribution, on the ground that it was necessary for them to apply for execution in the Subordinate Judge's court before they could be allowed rateable distribution under section 73 of the Code of Civil Procedure. On the other hand the opposite parties contended that it was sufficient in the circumstances for them to make an application to the Subordinate Judge's court to share in the proceeds of the attached property.

The learned Subordinate Judge considered a number of authorities cited before him in support of the contentions of the parties. He noted that there was no reported case of this Court on the point and that certain other High Courts that have had occasion to consider the question have taken divergent views. He preferred to follow the authorities cited on behalf of the opposite parties which appeared to him to be in accordance with the dictates of equity. He accordingly allowed rateable distribution to the opposite parties.

In this Court the learned counsel for the applicant has contended that, unless the decree is transferred to the court in which the assets are realised and unless there is an application for execution of the decree in that court, no rateable distribution can be allowed in favour of a decree-holder who has obtained a decree

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against the same judgment-debtor and attached the same property in a court of lower grade. He relies on the authorities cited in the judgment of the court below in support of this proposition.

The Madras High Court has taken the view that the decree obtained in the court of lower grade must be transferred to the court in which the assets of the judgment-debtor are realised and that the decree-holder must make an application for execution in that court, before he can obtain a rateable share in such assets under section 73 of the Code of Civil Procedure: *Chella Narasiah* v. *Sontan Obbayya* (1) and *Nanjunda Chettiar* v. *Nallakaruppan Chettiar* (2). The Bombay High Court has taken a similar view: *Nimbaji Tulsiram* v. *Vadia Venkati* (3). All these were cases decided by a single Judge. On the other hand the Calcutta High Court has held that holders of decrees of inferior courts, whereof execution has been stopped by the superior court under section 63 of the Code of Civil Procedure, are entitled to apply to the latter for rateable distribution under section 63 read with section 73 of the Code without any further application: *Clark* v. *Alexander* (4) and *Girindra Nath Ray* v. *Kedar Nath Bidyanta* (5). The same view has been taken by the Rangoon High Court in *Kwai Tong Kee* v. *Lim Chaung Ghee* (6) and *M. T. T. K. M. M. N. Chettyar Firm* v. *K. P. A. N. M. Firm* (7), and by the court of the Judicial Commissioner, Nagpur, in *R. S. Kholkute* v. *Tukaram Kunbi* (8). *Girindra Nath Ray* v. *Kedar Nath Bidyanta* (5) and *Kwai Tong Kee* v. *Lim Chaung Ghee* (6) were decided by a Bench of two Judges. Thus the weight of authority appears to be distinctly in favour of the opposite parties. In *Girindra Nath Ray* v. *Kedar Nath Bidyanta* (5) a large number of previous decisions of the Calcutta High Court

(1) (1913) 21 Indian Cases, 869.
(2) A. I. R., 1928 Mad., 496.
(3) (1892) I. L. R., 16 Bom., 683.
(4) (1893) I. L. R., 21 Cal., 200.
(5) (1924) 29 C. W. N., 575.
(6) (1928) 110 Indian Cases, 744.
(7) (1929) 120 Indian Cases, 693.
(8) (1928) 110, Indian Cases, 524

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were reviewed and *Ramjas Agarwala* v. *Guru Charan Sen* (1), a case relied upon by the learned counsel for the applicant, was expressly dissented from.

Speaking for myself, and with due respect, I entirely agree with the view of the law laid down in *Girindra Nath Ray* v. *Kedar Nath Bidyanta* (2). I may add that the decision of the court below having done substantial justice between the parties, I should in any case have been disinclined to interfere in revision. The application is accordingly dismissed with costs.

Before Mr. Justice Niamat-ullah

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* MADHURI DAS NARAIN DAS (PLAINTIFF)*

1933 *March*, 30

Railways Act (IX *of* 1890), *section* 72—*Risk-note Form B*—*"Misconduct"—Wrong consignment number entered in railway receipt—Right of consignee to "open delivery"—Delay in making delivery—Loss caused by prices falling during such delay—Liability of railway.*

A consignment of ghee was marked as No. 93, but by some mistake of the railway clerk the number entered in the railway receipt was 23. When the consignee went to take delivery he was offered the canisters marked No. 93, but as the number did not tally with that entered on the railway receipt he was doubtful whether these were the right goods, and demanded an "open delivery", i.e. that the canisters should be opened and their contents examined by him before accepting delivery. As it was beyond the authority of the local railway officials to give an "open delivery" they transmitted the consignee's request to higher authorities, and after some days a higher official arrived and gave the open delivery, and the contents were found to be right. During this interval, however, the market prices of ghee had gone down considerably, and the consignee sued the railway for damages for the loss resulting from this fall in prices. The question arose whether the railway was protected against such a claim by the terms of risk-note Form B, under which the consignment had been booked.

Held, that the loss complained of by the plaintiff was not

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* Civil Revision No. 751 of 1932.

(1) (1909) 14 C. W. N., 396. (2) (1924) 29 C. W. N., 575.

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covered by the indemnity clause in risk-note Form B. The clause in question protects the railway administration against a claim for damages arising out of loss or destruction or deterioration of, or damage to, the goods, and cannot be applicable to a case where the claimant is damnified, not by loss, destruction or deterioration of the goods themselves, but by some act of the railway administration or its employees not affecting the condition of the consignment or the goods consigned.

Held, also, that in the circumstances the plaintiff was entitled to insist on an open delivery, before giving a discharge to the railway administration, and the responsibility for the delay in delivery was not his, but that of the railway administration.

Held, further, that want of proper care and caution may amount to "misconduct" within the meaning of risk-note Form B. A mistake in the preparation of the railway receipt, which throws doubt on the identity of the consignment to which it relates, is a misconduct in the above sense.

Mr. *Ladli Prasad Zutshi*, for the applicant.

Mr. *Damodar Das*, for the opposite party.

NIAMAT-ULLAH, J. :—This is an application in revision by the Secretary of State for India in Council against a decree passed by the Judge of the small cause court at Allahabad in a suit brought by the plaintiff opposite party for damages arising out of late delivery of a consignment sent by G. I. P. Railway from Lalitpur to Naini. The consignment was under risk-note B, which implies that in consideration of payment of a lower freight the railway company is relieved of its responsibilities as bailee to a certain extent. The circumstances leading to the institution of the suit which has given rise to this application in revision are briefly as follows.

The consignment in question arrived at its destination, Naini, on the 19th of August, 1931. The name of the consignee entered in the railway receipt was that of the firm Madhuri Das Narain Das, the plaintiff opposite party. The railway receipt described the relative consignment as No. 23, which implied that the consignment also bore the same number, so that at the

time of delivery the consignee could assure himself as regards the identity of the consignment which he had to take delivery of. As already stated, the consignment was under risk note B. Another consignment addressed to the plaintiff opposite party had arrived two days earlier, i.e. on the 17th of August, 1931. Through some misunderstanding, the nature of which it is not necessary to mention, he paid not only the freight due in respect of that consignment but also the freight payable in respect of the consignment in question. The plaintiff opposite party arranged for delivery being taken on the 19th of August, 1931. The person deputed by him for that purpose proceeded to the railway station and demanded delivery of the consignment. The consignment consisted of a number of canisters of ghee. The railway official showed his readiness to hand over a number of canisters said to be those mentioned in the receipt presented by the plaintiff's man; but the latter discovered that the canisters bore No. 93 and not 23, as mentioned in the railway receipt. He entertained some doubt regarding the identity of the consignment. Accordingly he requested that "open delivery" be made. In other words, he desired that the contents of the canisters be examined by him in the presence of the railway official giving him delivery of the same. The canisters would have to be opened for the purpose of examination. The railway official noted this request for transmission to the higher authorities as he could not allow the canisters to be opened on his own responsibility before delivery was taken. On the 25th of August, 1931, the plaintiff sent a letter to the Divisional Traffic Manager, G. I. P. Railway, Jubbulpore, complaining that a great delay had occurred in the delivery of goods. The circumstances in which open delivery was insisted upon were mentioned in detail. The letter also contained a warning that the prices of ghee had gone down and were going down still further and that the railway company would be responsible for any loss

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occasioned by the delay. It was not delivered till the 1st of September, 1931, when an inspector came to Naini and allowed the plaintiff's man to open the canisters to satisfy himself regarding the contents. This was done and delivery of the goods taken on behalf of the plaintiff. Between the 19th of August, 1931, and the 1st of September, 1931, the price of ghee went down considerably, the difference amounting to Rs.150-7, which is claimed by the plaintiff together with interest amounting to Rs.16.

The only ground on which the plaintiff's claim, as stated in the plaint, is based is that delivery should have been made on the 19th of August, 1931, and that the unwarranted delay which resulted in loss to the plaintiff was attributable to the railway staff. It was pleaded in defence that the plaintiff was not justified in refusing to take delivery on the 19th of August, 1931, except after examining the contents of the canisters.

It was admitted on behalf of the defendant that No. 23, entered in the railway receipt, was the result of a mistake and that the correct number which the consignment bore, viz. No. 93, should have been noted in the receipt.

The lower court held that the railway administration was responsible for the loss occasioned to the plaintiff in consequence of late delivery, inasmuch as the mistake in the receipt as regards the number of the consignment amounted to a misconduct on the part of railway officials. On this finding the suit has been decreed.

It has been argued before me by the learned advocate for the applicant that the consignment being under risk-note B, the railway administration could not be held responsible for any loss which might have resulted to the plaintiff. Reference has been made to section 72 of the Railways Act, which provides that the responsibility of a railway administration for the loss, destruction or deterioration of goods delivered to the

administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act of 1872. Sub-section (2) of the same section provides that an agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it is in writing signed by or on behalf of the person consigning or delivering to the railway administration the goods and is otherwise in a form approved by the Governor-General in Council. It is not disputed that the risk-note B, employed in this case, is in accordance with the form approved by the Governor-General in Council. It is also not disputed that the general liability of the railway administration, referred to in the earlier part of section 72, is subject to the limitations imposed by the risk-note B. The note contains the following clause: "We, the undersigned, do, in consideration of such lower charge, agree and undertake to hold the said railway administration harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever, except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants." Then follow certain provisos, which it is not necessary to mention for the purpose of this case. It is argued that the loss complained of by the plaintiff is covered by the indemnity clause quoted above. I do not think this contention is sound. The clause in question protects the railway administration against a claim for damages arising out of loss or destruction or deterioration or by damage to the goods, and cannot be applicable to a case where the claimant is damnified, not by loss, destruction or deterioration of the goods themselves but by some act of the railway administration or its employees not affecting the condition of the consignment or the goods consigned. Obviously the note is intended to protect railway administrations where goods

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in whole or in part are lost or destroyed or spoiled otherwise than through misconduct of the railway administration or its employees. The plaintiff's case has no reference whatever to anything having happened to the goods themselves, which arrived safely at their destination. The plaintiff was entitled to take delivery of the goods on the 19th of August, 1931, when he presented the railway receipt. He was also entitled to take delivery of the consignment according to the description thereof given in the railway receipt. The railway officials, however, offered to deliver goods bearing a different number. The plaintiff had reason to doubt the identity of the canisters which he was asked to take delivery of. The railway receipt in his possession entitled him to insist on delivery of a consignment bearing No. 23. It does not appear to have been so represented, but it was clearly implied in the action of the railway employees who offered the canisters bearing No. 93, that the number entered in the railway receipt was wrong and that the correct number which should have been entered in it was 93. The plaintiff was justified in not accepting this assurance, except after an examination of the canisters to satisfy himself whether they contained ghee or something else. As a prudent man, the plaintiff was justified in insisting on the contents being examined before he could give a discharge to the railway administration. In case the contents did not turn out to be ghee, as mentioned in the railway receipt, delivery would have been lawfully refused and the fact would have been noted by the railway official, so that no dispute could arise in future as to whether the contents turned out to be something different from ghee. In these circumstances the plaintiff was within his rights in insisting on the consignment bearing the same number as given in the receipt being delivered to him, or, in the alternative, on permission being given to him to examine the contents before taking delivery of the goods so as to give a discharge to the railway administration.

I have been told that open delivery could not be given by the station master at Naini on his own responsibility and that, according to the rules by which he was bound, he had to make a reference to the higher authorities who were to arrange for the presence of some responsible railway official for open delivery to be given. It is argued that the delay was not unreasonable in the circumstances of the case, as some time would elapse before the presence of such official could be arranged for with due regard to the exigencies of the railway administration. Assuming such a rule does exist, it is only a departmental rule and cannot bind third persons, who are entitled to insist on their legal rights. It was clearly the duty of those representing the railway either to deliver the goods the description of which tallied with that entered in the railway receipt or to afford an opportunity to the plaintiff to examine the contents with a view to satisfying himself as regards the identity of the goods. If, therefore, through negligence or otherwise, the railway administration could not deliver the goods on due date, or even within a reasonable time after that date, it must be held to be liable for any loss which the plaintiff suffered. The important fact, which should not be lost sight of in this connection, is that the entire difficulty with which the plaintiff and also the railway officials at Naini were confronted on the 19th of August, 1931, arose out of the mistake committed by the clerk who prepared the railway receipt. The railway administration must be held responsible for the action of one of its employees. The learned Judge has expressed the opinion that the mistake amounted to a misconduct. This was because the learned Judge thought that the risk-note B protected the railway administration in the absence of evidence establishing misconduct on the part of the railway administration or its employees. I have taken a different view of the risk-note B and do not think it necessary to hold that the mistake amounted to a misconduct. I may, however,

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note that the word "misconduct" occurring in risk-note B is of wider import than the popular sense in which that word is used. Want of proper care and caution may amount to misconduct within the meaning of the risk-note B. A mistake in the preparation of the railway receipt, which throws doubt on the identity of the consignment to which it relates, is a misconduct in the above sense.

In the view of the case I have taken, this application for revision is dismissed with costs.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

1933
March, 31

RAM PRASAD (PLAINTIFF) *v.* BINAEK SHUKUL (DEFENDANT)*

Limitation Act (IX of 1908), sections 19, 20—Payment in handwriting of debtor but without specifying whether towards interest or principal—Appropriation by creditor towards interest—Not payment of interest as such—Acknowledgment—Part payment, by itself, is not acknowledgment of the balance.

It is an erroneous assumption that where interest is not paid as such, i.e., the debtor does not clearly mention that the payment made by him is to be appropriated towards interest, it should be considered to have been paid by him towards principal. A debtor may pay a certain amount in part satisfaction of what is due from him, without specifying that the sum is to be appropriated towards interest or principal; the creditor may, however, appropriate such payment towards interest, as he is entitled to do under section 61 of the Contract Act, but the payment cannot be considered to be the payment of interest as such, within the meaning of section 20 of the Limitation Act. Nor can it be considered to be payment in part satisfaction of the principal, as it has been lawfully appropriated by the creditor towards interest. Therefore, although the fact of the payment may appear in the handwriting of the debtor, limitation is not saved under section 20 of the Limitation Act.

*Second Appeal No. 1638 of 1931, from a decree of J. C. Malik, Additional Subordinate Judge of Mirzapur, dated the 20th of July, 1931, confirming a decree of Shambhu Dayal Singh, Munsif of Mirzapur, dated the 18th of June, 1930.

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RAM PRASAD v. BINAEK SHUKUL

Where a debtor pays a certain sum of money to his creditor, it cannot be said that such payment amounts to an acknowledgment under section 19 of the Limitation Act of liability for the balance which may be proved to be remaining due.

Dr. *K. N. Katju* and Mr. *Ambika Prasad*, for the appellant.

Mr. *A. P. Bagchi*, for the respondent.

NIAMAT-ULLAH and RACHHPAL SINGH, JJ. :—This is a plaintiff's appeal and has arisen out of a suit for recovery of Rs.1,070-3-6 made up of Rs.595-13-9 principal and Rs.474-7-6 interest together with another sum of Re.0-2-3 which need not be detailed, on the allegation that the defendant purchased on the 25th of June, 1914, from the plaintiff ornaments and cloth of the aggregate value of Rs.1,003-9-6, and that he paid Rs.210-10-0 on that date promising to pay the balance within a month. It is also alleged that the defendant agreed to pay interest in case of non-payment of the aforesaid sum within the stipulated time.

* * * * *

The suit was resisted principally on the ground that it is barred by limitation. The plaintiff attempted to escape the bar of limitation by relying upon a number of payments made by the defendant which, according to him, saved limitation under sections 19 and 20 of the Indian Limitation Act.

* * * * *

The defendant made a number of payments after the date of the transaction, the first of which was made within 3 years from that date. Each subsequent payment is within 3 years from the date of the next preceding payment. It follows that if every one of the payments fulfils the requirements of section 19 or 20 of the Indian Limitation Act, the plaintiff may be held entitled to a decree. But to arrive at that finding every payment has to be examined in the light of the provisions of sections 19 and 20 of the Indian Limitation Act.

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RAM PRASAD v. BINAEK SHUKUL

The first payment of Rs.40 is said to have been made on the 7th of February, 1918. There is no evidence that the defendant paid that sum towards interest. The plaintiff's case is that interest was payable and was overdue. In the account annexed to the plaint the plaintiff has charged interest and has appropriated each payment towards interest. At any rate, the sum of Rs.40 paid on 7th of February, 1918, was appropriated towards interest. It is argued by the learned counsel for the appellant that if the defendant did not pay Rs.40 towards interest he must be taken to have paid it towards principal, and as the fact of payment appears in his handwriting, section 20 is fully applicable. In our opinion this argument is based on a fallacy and proceeds on the assumption that where interest is not paid as such, that is, the debtor does not clearly mention that the payment made by him was to be appropriated towards interest, it should be considered to have been paid by him towards principal. To our mind this is a wholly erroneous assumption. A debtor may pay a certain amount in part satisfaction of what is due from him without caring to specify that the sum is to be appropriated towards interest or principal. The payment will not be considered to be the payment of interest as such and will not save limitation on that footing. The creditor may, however, appropriate such payment towards interest, as he is entitled to do under section 61 of the Indian Contract Act. The position then is that though interest was not paid as such, payment made by the debtor was lawfully appropriated towards interest. It cannot be considered to be payment in part satisfaction of the principal. Therefore, if the fact of payment appears in writing, limitation cannot be saved on the supposition that a part of principal was paid and the fact of payment appears in the handwriting of the debtor. As already stated, payment of Rs.40 made on the 7th of February, 1918, was not made towards interest. The creditor did appropriate it in satisfaction

of the interest. The payment was not payment of interest as such and cannot save limitation and though it is in writing it cannot be assumed to be payment of principal so as to save limitation under section 20.

It was also contended that each payment amounted to an acknowledgment of liability within the meaning of section 19. It is said that payments were noted by the defendant on each occasion on a certain copy book which the plaintiff's peon used to take round to the debtors. This copy book was produced in the lower courts. It has not come up with the record of the case. We declined to adjourn the case as the entries on that copy book were not relied on in either of the two courts below as containing acknowledgments under section 19 of the Indian Limitation Act. The fact of payment which is not disputed was also relied on as acknowledgment under section 19. Where a debtor pays a certain sum of money to his creditor, there may be an implied acknowledgment of the liability to the extent of the amount paid. It cannot, however, be said that the remaining liability shown by evidence *aliunde* should be deemed to have also been acknowledged. In this view the payment of Rs.40 on the 7th of February, 1918, cannot amount to an acknowledgment under section 19 of the Limitation Act. As limitation is not saved by the first item, the debt became time barred by the time the next payment was made on the 27th of April, 1919, and subsequent payments can be of no avail, even if they fulfil the requirements of section 20 or amount to acknowledgments under section 19. Accordingly we hold that the plaintiff's claim was barred by limitation.

For the reasons stated above, this appeal fails and is dismissed with costs.

MISCELLANEOUS CIVIL

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Rachhpal Singh

1933
April, 3

KUNDAN LAL (PLAINTIFF) *v.* NATHU (DEFENDANT)*

Provincial Insolvency Act (V of 1920), section 44(2)—Effect of discharge, as against a creditor without notice of the insolvency proceedings—Insolvency Rules framed by High Court, rule 34—Proclamation of insolvency proceedings—Notice.

The rule of law enacted by section 44(2) of the Provincial Insolvency Act, namely that an order of discharge shall release the insolvent from all debts provable under the Act, is not qualified by any rule that the creditor should have notice of the proceedings. The rule is based on a policy of law and not on any rule of constructive notice. Where no question of fraud is involved, the fact that a creditor had no notice of the insolvency proceedings does not prevent the operation of section 44(2) as against him, and the order of discharge releases the insolvent from the debt provable under the Act which was due to the creditor.

It may be desirable, in the interests of justice, that the rules should provide for some advertisement or proclamation of insolvency proceedings.

Mr. *I. B. Banerji*, for the plaintiff.

Dr. *N. C. Vaish*, for the defendant.

MUKERJI and RACHHPAL SINGH, JJ.:—This is a reference by the learned Judge, small cause court of Jhansi, in the following circumstances: The plaintiff Kundan Lal sued the defendant Nathu for recovery of a sum of Rs.137-12-0 on foot of a promissory note dated the 31st of May, 1929, executed for Rs.82. The defendant put up two defences. One was that the real holder of the promissory note was not Kundan Lal but his master Ram Prasad; and that the defendant had been discharged from insolvency and that therefore the suit was not maintainable. The learned Judge found that there was no evidence before him to prove that

*Miscellaneous Case No. 467 of 1932.

Kundan Lal was not the real holder of the promissory note but his master was. Then the learned Judge proceeded to consider the effect of Nathu having been declared an insolvent and subsequently discharged, but finding himself unable to come to a clear decision referred the matter to us.

The question has been formulated as follows: How does the fact of the defendant being a discharged insolvent affect the case?

On the last occasion when the case came before us, we sent for the record of the insolvency case so that we might be in full possession of the facts relating to it. It appears that Nathu made an application for being declared an insolvent on the 31st of May, 1930, and in the list of creditors he mentioned one Ram Prasad and mentioned Rs.82 as the amount of the debt payable to him. We find many acknowledgments on the record that the notice issued to Ram Prasad was received by one Kundan Lal, who signed himself as the mukhtar-i-am of Ram Prasad. If it were of any importance in this case to decide the point, we might notice that the signature of Ram Prasad in the pen of Kundan Lal seems to be similar to the signature of Kundan Lal himself in the petition of plaint in the small cause court suit. However, we have not to decide any question of fact but only the question of law. After notices were issued to the creditors mentioned in the schedule attached to the petition, and without any publication of notice in the local official gazette or in any local newspaper, Nathu was given a discharge.

The case of Kundan Lal is that he never heard of the proceedings in insolvency and could not have possibly proved his debt in those proceedings. The question is whether in the circumstances Kundan Lal's debt has become unenforceable although he had no notice of the proceedings.

For an answer to the question we have to look to the rules of law enacted under the Provincial Insolvency

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Act. Section 42 deals with discharge and section 44 mentions the result of discharge. Under section 44, sub-clause (2) "an order of discharge shall release the insolvent from all debts provable under this Act." There are certain exceptions, but this case does not fall within any of the exceptions. This rule of law, namely an order of discharge shall release the insolvent from all debts provable under this Act, is not qualified by any rule that the creditor should have notice of the proceedings. In our opinion the rule is based on a policy of law and not any rule of constructive notice. Notice or no notice, therefore, the section 44 comes into play and releases the insolvent from the debt in question which could undoubtedly have been proved under the Act. There is no question of fraud involved in the case and we need not express any opinion on that point. This view seems to be in consonance with the English decision in *Elmslie* v. *Corrie* (1) which is based on sections 49 and 125 of the Bankruptcy Act of 1869.

Mr. *I. B. Banerji*, who appears for the creditor, has drawn our attention to rule 34 framed by this High Court under section 79 of the Provincial Insolvency Act and has urged that it would be in the interest of justice to modify the rule to this extent that at least some advertisement might appear in a local newspaper and that some steps might be taken to proclaim the insolvency proceedings by beat of drums in the locality in which the insolvent resides. We think that there is some force in this proposal and a copy of our judgment will be circulated for the information of the learned Judges of this Court so that, if necessary, the rule may be amended.

Coming back to the point in question we see no reason to hold that the discharge was dependent on notice being given to the plaintiff. The result would be the same even if the omission of the name of Kundan Lal was

(1) (1878) 4 Q.B.D., 295.

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deliberate on the part of the insolvent, provided, of course, no question of fraud is involved. Our answer, therefore, to the question framed by the learned Judge of the small cause court is that the defendant is discharged from the liability under the promissory note in suit.

APPELLATE CRIMINAL

Before Mr. Justice Young and Mr. Justice Thom

EMPEROR *v.* UJAGAR AND OTHERS*

1933
April, 5

Witness—Testimony of perjured witness should be entirely discarded and not used for any purpose—Evidence—Degree of proof—Not affected by degree of gravity of the charge—Quantum of evidence—Communal riot cases—Evidence Act (I of 1872), *section* 134*—Oath, efficacy of.*

The evidence of a witness proved to have committed perjury is of no value whatsoever and cannot be used for any purpose; that is, by itself, or to corroborate or be corroborated by truthful evidence.

There is only one standard of proof for all charges, and that is that the Crown must prove the charge beyond all reasonable doubt. The nature of the sentence cannot affect the question of proof. Where the accused was charged with murder and arson, and the evidence both on the murder charge and the arson charge was precisely the same, but the Sessions Judge thought that a lesser standard of proof might be applied to the arson charge but that a higher standard was necessary for convicting on a capital charge and inflicting an irrevocable sentence, and gave the accused the benefit of doubt in respect of the murder charge but convicted him on the arson charge, it was *held* that the benefit of the doubt should have been given on both charges.

In communal riot cases it is unsafe to convict on the evidence of one witness alone, unless there is satisfactory circumstantial evidence in addition.

The oath administered in Indian courts to Indian witnesses is of an unsatisfactory nature.

Mr. *K. D. Malaviya*, for the appellants.

*Criminal Appeal No. 34 of 1932, from an order of H. J. Collister, Sessions Judge of Cawnpore, dated the 28th of November, 1931.

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v.
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The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

YOUNG and THOM, JJ. :—Fourteen persons were committed to the court of session of Cawnpore, charged under sections 302, 396, 436 and 147 of the Indian Penal Code. Against four of them further charges were made under section 307 of the Indian Penal Code. The learned Sessions Judge acquitted no less than eleven but convicted Ujagar, Narain and Bandi Din; the first two under sections 147 and 436 of the Indian Penal Code and the latter under sections 147, 436, 307 and 302. Ujagar and Narain were sentenced to rigorous imprisonment for two years under section 147 and to ten years' rigorous imprisonment under section 436. Bandi Din was sentenced to two years' rigorous imprisonment under section 147, ten years' rigorous imprisonment under section 436 and ten years' rigorous imprisonment under section 307. Under section 302 he was sentenced to transportation for life; the sentences in all cases to run concurrently.

On the 24th of March, 1931, the well known murderous riots in Cawnpore commenced. After raging there for a few days the riot and slaughter spread to the surrounding villages. On the 28th and 29th of March in the hamlets of Fatehpur, Barhat, Hingupur and Paigupur, some seven miles from Cawnpore, the riots, the subject-matter of the charges in this case, took place. The land in those hamlets is alluvial and used as grove land. All the huts and dwellings of the Mussalmans in that neighbourhood were burnt and nine men, women and children were murdered there. A band of 150 to 200 Hindus marched to this district at about 2 o'clock in the afternoon on the 28th, and butchered these men, women and little children and burnt their dwellings.

We are not concerned whether there was a riot or not; that is admitted. The only question which we have to consider is whether Ujagar, Narain and Bandi

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Din, those persons who have been convicted in the lower court and who have appealed to the High Court, are guilty of the offences with which they were charged. Before we consider the cases of the individual accused we think it necessary to make some preliminary observations :—

1. We ruled recently in the Raiya riot case *Emperor* v. *Shukul* (1) that the evidence of a witness proved to have committed perjury was of no value whatsoever and could not be used for any purpose; that is, by itself, or to corroborate or be corroborated by truthful evidence. That ruling has been followed by a Bench of this Court, of which one of us was a member, in *Emperor* v. *Ram Kumar* (2) and by one of us sitting alone in *Man Singh* v. *Emperor* (3). The reasons for that ruling have been sufficiently set out in the judgments in those cases and we do not need to repeat them here. We follow that ruling in this case in considering the value of certain witnesses for the prosecution. The learned Sessions Judge, in a careful judgment, has for excellent reasons found the approver Babu Lal and a witness Madar Bakhsh guilty of lying. Nevertheless, in accordance with the practice too frequently followed in this country, he has relied on the evidence of both when corroborated. In fact he has gone rather farther than is usual, for in the case of Bandi Din he has used the evidence of both these liars to corroborate each other in conjunction with the evidence of another unsatisfactory witness. On this evidence he has convicted Bandi Din.

2. In the case of Narain the learned Judge lays down a rule of law from which we strongly dissent. He says : "Evidence which may be good enough to prove a lesser offence may not necessarily reach the high standard which is required for convicting a man on a capital charge and inflicting an irrevocable sentence." Narain was charged with murder and arson. There was the

(1) (1933) I.L.R., 55 All., 379. (2) Cr. A. No. 346 of 1932, decided on 5th of April, 1933.
(3) [1933] A.L.J., 581.

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same evidence on both charges. On the murder charge the learned Judge—acting on the principle set out above —gives Narain the benefit of his doubt, but not on the arson charge.

It cannot be stated too emphatically that there is only one standard of proof for all charges, and that is that the Crown must prove the charge beyond all reasonable doubt. The nature of the sentence cannot affect the question of proof.

3. In communal riot cases we think it unsafe to convict on the evidence of one witness alone, unless there is satisfactory circumstantial evidence in addition.

4. We again call attention to the unsatisfactory nature of the oath administered in Indian courts to Indian witnesses. It surely is not beyond the resources of the legislature to discover an oath or oaths which Indian witnesses would respect.

We next consider the individual witnesses and the nature of their evidence :—

(1) *Babu Lal*, approver. This man undoubtedly took part in the riot and indeed we think it satisfactorily established that he actually murdered one of the victims. Of this man the learned Judge in the court below says as follows : "But he did not impress me at all favourably as a witness and I do not think that his evidence can be trusted far. In his statement under section 164 and in his examination in the Magistrate's court in the case against accused Nos. 1 to 12 Babu Lal gave the court to understand that he had taken no part whatsoever in the rioting which took place on the west of Bithur road, but here he would have the court believe that he was present when the groves of Manna and Rasul Bakhsh were attacked. Apart from the previous statements of Babu Lal, there are certain facts in the deposition which he has made in this court which suggest that he has lied in saying that he took part in the attack on Manna's huts . . . When asked whether it was a fact that he cut Allah Din's throat as alleged by Mst. Batulan, he

gave the remarkable answer that he did not remember. The facility with which Babu Lal can lie is indicated by the fact that when the prosecutor by mistake asked him why he had not identified in jail those accused whom he has named, he replied that his reason for not doing so was that the Circle Inspector told him that there was no need for him to identify those men; but when his attention was drawn to the fact that those accused were not paraded before him in jail at all, he said that he had given the above reply because he thought it was expected of him by the prosecutor." Again in another part of the judgment the learned Judge says: "He either lied in his previous statements or else he is lying now. In any case, no reliance can be placed on what he states in this court in respect to the incidents which took place on the west of the road." The above observations of the learned Sessions Judge clearly establish that Babu Lal has sworn falsely. We discard the evidence of the approver Babu Lal in so far as it affects any of the appellants before us.

(2) *Rasul Bakhsh.* With regard to this witness the learned Judge has said as follows: "Nor can I rely with any confidence on the testimony of Rasul Bakhsh." Later on the learned Judge also observes: "I find it very difficult to believe that Rasul Bakhsh had the courage to hide so close to his house . . . and I find it desperately hard to put any real confidence on Rasul Bakhsh's testimony . . . After having carefully considered the testimony of Rasul Bakhsh, I distrust it." It is quite clear from these extracts, with which we agree, that Rasul Bakhsh also is a witness of no value.

(3) *Madar Bakhsh.* The learned Judge says of this man as follows: "Madar Bakhsh has identified Ram Bharose in jail and in court. He pretends that he did not know Ram Bharose before; but in cross-examination he has had to admit that he had a quarrel with Ram Bharose in respect to some lemon trees which the latter uprooted and took away. He admits that he dunned

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Ram Bharose two or three times for the price of the lemon trees. He has, therefore, obviously lied in saying that he did not know Ram Bharose and his evidence against the accused accordingly becomes suspect." Again in another place the learned Judge says: "Madar Bakhsh denies having known Mulla before the riot; but when counsel for the accused made Mulla stand up in the dock and suddenly asked Madar Bakhsh where Mulla lived, the latter replied in Ishriganj." Further, this witness has made various contradictory statements. On the 1st of April Madar Bakhsh was taken to hospital. He told the sub-inspector on that day that he did not know the names of any of the assailants, but later on the same date to a Magistrate in the hospital he gave the name of Bandi Din, one of the appellants in this case. In his statement in the sessions court he says: "Moslem *raises* of the city used to come and see the patients. They asked me how I had received my injuries. I do not remember whether I told them that I had not yet made a report. They asked me if I had recognized any of my assailants. I do not remember who asked me or where. They asked me in the hospital; I remember that I told them I could recognize 2 or 4 or 6 men if I saw them. I gave no names because I then knew no names." It is to be noted that the interview with these Moslem *raises* took place some two or three weeks after this witness had named Bandi Din to the Magistrate on the 1st of April. Further, when several previous statements were put to this witness in cross-examination he contradicted those statements or said that he did not remember whether he had made them or not . . . Madar Bakhsh gave evidence in this case against four of the accused. The Judge disbelieves him in two cases and does not rely upon his evidence in a third. With regard to Bandi Din, one of the appellants before us, however, he relies upon Madar Bakhsh as corroborating Babu Lal, the approver, about whose evidence we have sufficiently commented above. We are satisfied on a

careful consideration of the above facts that Madar Bakhsh is a witness whom no one can believe and upon whom it would be unsafe to rely against any of the appellants. 1933 EMPEROR v. UJAGAR

* * * * *

Dealing with the individual cases of the appellants we shall consider first that of Ujagar. Three witnesses were called to give evidence against this appellant, Daulat, Babu Lal and Rasul Bakhsh. From what we have said above we must ignore the evidence of Babu Lal and Rasul Bakhsh. This leaves one witness alone against Ujagar, namely Daulat. On general principles we must say that in the case of a communal riot one witness is insufficient for a finding of guilty and on this ground alone we must allow the appeal of Ujagar. But we have this further to say about the evidence of Daulat that all he says against this appellant is as follows: "Many Hindus were at my huts. Four or five of them ran towards me. One of them struck me a *lathi* blow on the head. I fell. I recognized Ujagar Kori of Ludhauri (witness points out Ujagar). One of the others struck me. They bade me bring my money. I said I had none. Ujagar said: 'He is a poor man and he is half dead from one *lathi* blow. He will die from a second blow.' Then they went towards Allah Din's huts. Ujagar went with them. I knew Ujagar from his childhood. My grove adjoins the boundary of his village and we have smoked *ganja* and *charas* together. Some of the 4 or 5 men who ran at me had *kantas*, some had spears and some had *lathis* with a blade attached. Ujagar had a *lathi*." The only thing that Ujagar certainly appears to have done was to intervene for the benefit of Daulat and save him from being murdered.

We therefore set aside the convictions and sentences passed upon Ujagar and order his immediate release.

Narain. Four witnesses give evidence against this appellant. They are Ghonche, Lukain, Rasul Bakhsh and Babu Lal. The evidence of Rasul Bakhsh, Babu

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Lal and Ghonche must be discarded for reasons already given. With regard to Lukain, the only evidence that this witness gives is that he saw Narain coming back with a crowd after Maniya's house had been burnt. He did not see any one actually at the house. He further saw this accused going on to Maniya's grove afterwards with the mob. Apart from the fact, as we have pointed out above, that in a communal riot case one reliable witness is insufficient for conviction, we have the fact that the learned Judge himself clearly records that he has a doubt as regards this accused. The learned Judge records as follows in his judgment: "On the other hand, there is no evidence to show that Narain actually took part in the assaults and murder which were committed in Manna's grove, in fact there is no evidence to show what he did at all in Manna's grove; but the fact that he was among those who began to set fire to the cart of Rasul Bakhsh at Lukain's huts leads to the inference that he at least shared the common object of committing arson. It may be argued that it can also be inferred that he shared the common object of committing murder. It may be so, but, as I have already said, there is nothing to show what he did in Manna's grove or whether he went to Allah Din's grove; and in any case I think that evidence which may be good enough to prove a lesser offence may not necessarily reach the high standard which is required for convicting a man on a capital charge and inflicting an irrevocable sentence. I therefore prefer to give Narain the benefit of doubt in respect to the charge under section 302. In my opinion he is liable to be convicted under sections 147 and 436." It is clear in this case that the evidence both on the murder charge and the arson charge is precisely the same. There is no doubt according to the evidence that this appellant was with the crowd when the murders were committed. He was also with the crowd—and that is all—when arson was committed. The learned Judge, however, thinks that a lesser standard may be

applied as regards the evidence on the offence which is not punishable with hanging, but that a higher standard is necessary where hanging is involved. He, therefore, gives the benefit of the doubt in respect of the charge of murder but refuses to give it in respect of the charge involving arson. We deal with this question in our preliminary observations. This appellant ought to be given the benefit of the doubt on both charges. Viewing the case as a whole as against this accused we come to the conclusion that the conviction against him cannot stand. The convictions and sentences, therefore, are set aside and this accused will be set at liberty.

Bandi Din. With regard to this appellant the witnesses are Babu Lal, Rasul Bakhsh, Ghonche, Madar Bakhsh and Munne. From what we have set out above we cannot rely upon the first four. This leaves Munne only. Apart from the fact that the evidence of one witness is not sufficient, the only evidence which Munne gives is that of identification, and the learned Judge says of this identification that it was quite possible that he was familiar with the features of Bandi Din. Therefore there is not much value in this evidence. Madar Bakhsh certainly gave the name of Bandi Din in a statement which he made to the Magistrate on the 1st of April after having failed to name him to the Superintendent of Police on the same day. But the Bandi Din whom Madar Bakhsh named to the Magistrate was Bandi Din a *mallah* and a resident of Charana. The Bandi Din, the appellant, is a *kachhi* and a resident of Tisjha. As the learned Judge points out, this may possibly be an error because Tisjha adjoins Charana. We think that some doubt must be raised by the misstatement of the man's caste and his place of residence. In any event, we are satisfied that there is not enough evidence upon which to record a conviction against this accused. The result is that we set aside the convictions and sentences passed upon Bandi Din and order that he be set at liberty.

MISCELLANEOUS CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

1933
April, 10

HUSAIN BAKHSH (DECREE-HOLDER) *v.* BRIGGEN SHAW (JUDGMENT-DEBTOR)*

Civil Procedure Code, section 60(1), *proviso, clauses* (*i*) *and* (*j*)—*Attachment of salary of a soldier-officer—Army Act* (44 *and* 45 *Vic., cap.* 58), *section* 136—"*Public officer*".

The salary of a soldier to whom the Army Act, 44 and 45 Victoria, chapter 58, applies is attachable in execution of a decree in accordance with the provisions of section 60(1) of the Civil Procedure Code; if he is a public officer as defined in section 2(17) (*c*) of the Civil Procedure Code, his salary is exempt from attachment to the extent mentioned in clause (*i*) of the proviso to section 60(1), and if he is not such a public officer, it is not exempt from attachment at all.

Section 136 of the Army Act, 44 and 45 Victoria, chapter 58, as amended in 1895, makes itself subject to Acts passed by the Governor-General of India in Council; it is, therefore, subject to the provisions of the Civil Procedure Code, section 60.

The proviso to section 60(1) only exempts certain properties, including part of the salary and allowances of public officers, from attachment. If a property, salary or otherwise, does not fall within any of the clauses of the proviso, the general provisions contained in section 60(1) shall prevail and the property shall be attachable.

Parties were not represented.

NIAMAT-ULLAH and RACHHPAL SINGH, JJ. :—This is a reference by the learned Judge of the small cause court, Jhansi, under order XLVI, rule 1 of the Code of Civil Procedure. The learned Judge has not formulated the question on which the opinion of this Court is desired. Order XLVI, rule 1, requires the court making the reference to "draw up a statement of the facts of the case and the point on which doubt is entertained". We gathered from the order of reference that one Husain

*Miscellaneous Case No. 586 of 1932.

Bakhsh obtained on the 9th of June, 1932, a decree for Rs.33-8-0 against Mr. Briggen Shaw, No. 14A Transport Cavalry C. P. Mule, Quetta, Baluchistan. The decree-holder applied on the 24th of June, 1932, for execution of his decree by attachment of the judgment-debtor's salary, which was mentioned to be Rs.300 a month approximately. The learned Judge of the small cause court at Jhansi, who had passed the decree and to whom the application for execution was made, issued a notice to the judgment-debtor to "show cause on or before the 5th of August, 1932, why the amount of Rs.39-4-0 (which included the original sum claimed and costs and interest) should not be realized by attaching your pay". It should be noted that the law did not require a notice of this kind to be issued in the circumstances of this case. It is only where a case falls within the purview of order XXI, rule 22 of the Code of Civil Procedure that a notice is necessary before any process of execution can issue. Execution was applied for only two weeks after the passing of the decree and against the judgment-debtor himself, but the learned Judge issued a notice by way of courtesy. The judgment-debtor should have acknowledged receipt of the notice and, if so advised, should have objected to his salary being attached by the ordinary process recognized by law. He adopted the extraordinary and, we are bound to say, disrespectful procedure of making the following note on the back of the notice received by him :

"It is pointed out that my pay cannot be attached for debits and that traders allowing credit to serving soldiers do so at their own risk.

"2. It was pointed out to this man and he was told that if he wrote to the person that incurred the debt with him he would receive payment."

It should be observed that no reference is made to any law under which the judgment-debtor claimed protection against the attachment of his pay. At the hearing a

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reference was made by the decree-holder's pleader to the case of *Hay* v. *Ram Chandar* (1) in which it was definitely held that the pay of an officer of the Indian Army may be attached in execution of a decree against him to the extent of one-half. The learned Judge had also before him General Letter No. 5/44-9(1) of 1930, dated the 10th of February, 1930, from the Registrar of this Court to all District Judges subordinate to the High Court of Judicature at Allahabad, which he thought was somewhat in conflict with the case above referred to. This letter was circulated to all judicial officers to invite their attention to the provisions of section 120 of the Indian Army Act No. VIII of 1911, under which the pay and allowances of persons subject to that Act are exempt from attachment. The learned Judge was apparently under a misapprehension as to whether the Indian Army Act and the General Letter to which reference has been made by him have any relevancy in the present case. The judgment-debtor does not claim to be a person subject to the provisions of the Indian Army Act, VIII of 1911. Persons who are so subject are described in section 2 of that Act; and in view of what the judgment-debtor subsequently noted on the back of a notice issued by this Court we do not wish to consider the provisions of section 120 of Act VIII of 1911 in any detail.

* * * * *

On receipt of the reference a notice was issued by the High Court office under the signature of the Deputy Registrar to the judgment-debtor informing him that a certain date had been fixed for the disposal of the reference and that he should "appear in person or by an advocate duly prepared to inform the Hon'ble Court on the aforesaid date whether the judgment-debtor is or is not a person to whom the Indian Articles of War apply, that you should also supply the materials on which the information is based, and that the case will be laid before

(1) (1917) I.L.R., 39 All., 308.

the Court for disposal on such date or as soon thereafter as the same may be heard". The notice was served through the Commanding Officer on the 5th of December, 1932. The endorsement of receipt of notice has been made in the following words:

"1. Certified that I have been served with the duplicate of this Form.

"2. I have no knowledge of the case under reference

"3. Certified that I am a soldier serving under a normal period of engagement and subject to the Army Act."

* * * * *

The information conveyed to us by the "certificate" noted on the back of the notice is that the judgment-debtor is "a soldier serving under a normal period of engagement and subject to the Army Act". We may note at once that the Act referred to by him is not the Indian Army Act VIII of 1911 to which reference has been made by the learned Judge of the court below. The Act which is relied on by the judgment-debtor is the Army Act of 1881, 44 and 45 Vic., cap. 58. The question which calls for an answer, therefore, is whether a soldier to whom the Army Act applies is protected so far as the attachment of his pay and allowances is concerned.

Section 136 of the Army Act as it originally stood provided that "the pay of an officer or soldier of Her Majesty's regular forces shall be paid without any deductions other than the deductions authorised by this or any other Act or by any royal warrant for the time being." This section was amended by the Army Amendment Act of 1895, section 4 of which added the words "or by any law passed by the Governor-General of India in Council". Accordingly, if any Act of the Governor-General of India in Council made it permissible that part of the salary of an officer or soldier to whom the Army Act applied be deducted, the amended section 136 cannot come in conflict with it.

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Section 60 of the Code of Civil Procedure, as it originally stood, provided in clause (*b*) to sub-section (2) that nothing in that section affected the provisions of the Army Act. In view of this provision the pay of an officer or soldier to whom the Army Act applied and who served in India could not be attached. An important amendment was, however, made by Act X of 1914, by which clause (*b*) to sub-section (2), referred to above, was deleted, with the result that section 60(1) of the Code of Civil Procedure became applicable to officers and soldiers to whom the Army Act is applicable, unless there be something in the latter Act which excludes its application. As already noticed, section 136 of the Army Act, as amended in 1895, makes itself subject to Acts passed by the Governor-General in Council. The Code of Civil Procedure is an Act of the Governor-General in Council. It follows that a deduction from the salary of an officer or soldier, to whom the Army Act applies, can be made if the Code of Civil Procedure permits the same being done.

Section 60(1) of the Code of Civil Procedure provides, *inter alia*, that "save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit . . ." may be attached in execution of a decree. There can be no doubt that the salary of an officer or soldier, to whom the Army Act applies, as and when it becomes payable to him, is "property over which he has a disposing power" and that, except so far that it is protected by the proviso to that section, it is declared attachable by the opening part of section 60(1). The proviso to this section exempts certain property from attachment. One of the exemptions is contained in clause (*i*), which declares a portion of the salary and allowances of "public officers" drawing less than a minimum amount to be not attachable.

An officer or soldier to whom the Army Act applies is a public officer within the meaning of the aforesaid section. The term "public officer" is defined in section 2(17), Code of Civil Procedure. The question in each case will arise whether an officer or soldier, to whom the Army Act applies, is a public officer within the meaning of the proviso to section 60(1). We are unable to say whether the judgment-debtor in this case falls within any of the clauses of section 2(17) of the Code of Civil Procedure. Assuming he is one, his salary to the extent of half can be attached, as his salary is said to be Rs.300 a month. We may note in this connection that clause (*j*) of the proviso to section 60(1), which refers to Act VIII of 1911 (Indian Army Act), does not apply to the judgment-debtor, who claims to be subject to the Army Act.

Our view is supported by *Prins* v. *Murray and Co.* (1), decided by a Bench of the late Court of the Judicial Commissioner of Oudh, which has been followed by a Bench of this Court in *Hay* v. *Ram Chandar* (2). The last mentioned case does not, however, decide the point which has arisen before us. It has reference to a case to which the Indian Army Act was applicable. Our view finds further support from *Kering Rupchand and Co.* v. *Murray* (3) decided by the Bombay High Court.

We have considered the case of *Browne* v. *Pearce* (4) decided by a Division Bench of this Court, in which it was held that as the judgment-debtor, who was a Military Assistant Surgeon, was not a "public officer" within the meaning of section 60(1) (*h*) and (*i*) of the Code of Civil Procedure, therefore no portion of his salary was attachable. With great respect we would point out that the decision in that case proceeds on a misapprehension of the effect of the proviso to section 60(1) of the Code of Civil Procedure, as the following passage taken from the judgment in that case will clearly show: "*Attachment*

(1) (1914) 23 Indian Cases, 935.
(2) (1917) I.L.R., 39 All., 308.
(3) (1918) 50 Indian Cases, 683.
(4) (1925) I.L.R., 48 All., 73.

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is dealt with in section 60 *of the Code of Civil Procedure, and in the proviso to that section certain salaries of certain public officers or servants are attachable to a certain extent.* Section 2(17) describes who are the public officers who fall under the description of persons whose salaries are attachable." The learned Judges proceeded on the assumption that the proviso to section 60(1) *permits* attachment of property in the cases therein specified. It will be observed that the proviso merely exempts certain property from attachment, including part of the salary and allowances of public officers. If a property, salary or otherwise, does not fall within any of the clauses of the proviso, the general provisions contained in section 60(1) shall prevail, and the same shall be attachable.

In the circumstances discussed above, our answer to the reference is that if the judgment-debtor is a public officer, as defined in section 2(17) of the Code of Civil Procedure, his salary is exempt from attachment to the extent mentioned in clause (*i*) of the proviso to section 60(1) of the Code of Civil Procedure, and that if he is not such a public officer, it is not exempt from attachment to any extent.

APPELLATE CRIMINAL

Before Mr. Justice King and Mr. Justice Kisch

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April, 11

EMPEROR *v.* CHAUBE DINKAR RAO AND OTHERS*

Indian Penal Code, section 161 *with* 116—*Abetment of taking illegal gratification by public officer—Public officer suggesting willingness to take a bribe—Intention not dishonest but merely to set a trap—Whether payment of the bribe in such circumstances is punishable—Indian Penal Code, sections* 107, 108—*Abetment, where the person abetted has no guilty intention but simulates it.*

While a suit was pending before a Subordinate Judge, he was approached by one *J* who told him that the plaintiff

*Criminal Appeal No. 696 of 1932, by the Local Government, from an order of J. Allsop, Sessions Judge of Cawnpore, dated the 14th of June, 1932.

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would give him Rs.10,000 if he would decree the suit. The Judge at once turned him out of the house. A few days later, one *M*, who was a *pujari* of the plaintiff, came to see the Judge at his house. The Judge had reason to suspect him to be an emissary of the plaintiff for the purpose of offering him a bribe; and with the intention of setting a trap for the man the Judge himself suggested his willingness to take a bribe, and an amount and a date were settled. On the date fixed *M* and *D*, the son of the plaintiff, came with the money and handed it over to the Judge, whereupon they were caught by certain officers who had been concealed in the house by the Judge. *J*, *D* and *M* were put on their trial under section 161/116 of the Indian Penal Code and all of them were acquitted by the Sessions Judge. On appeal by the Local Government, *Held*—

As *J* did not offer any bribe, nor was he or claimed to be an agent or representative of the plaintiff, his statement, or expression of opinion, that the plaintiff would be willing to offer a bribe did not amount to an abetment of the offence under section 161 of the Indian Penal Code, and he was rightly acquitted.

D and *M*, the bribe givers, were guilty of abetment of an offence under section 161, although they only complied with a demand made by the public servant, and although the public servant had no guilty intention of receiving the money as a bribe.

Explanation 3 of section 108 of the Indian Penal Code makes it clear that the person abetted need not have any guilty intention in committing the act, so the fact that the Judge took the money without any guilty intention was immaterial, so far as the offence of abetment was concerned. The Judge, in taking the money, did not commit an offence under section 161 and the bribe givers, therefore, did not aid the commission; but they aided the Judge to commit an act, i.e. to take the money, which would be an offence if committed with the same intention as that of the bribe givers. They were, therefore, guilty of abetment of an offence under section 161, the abetment being not by instigation or by conspiracy with the Judge, but by aiding him in the commission of the act of taking the money.

Explanation 3 of section 108 of the Indian Penal Code applies to abetment generally and there is nothing to indicate

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that it applies only to abetment by instigation and not to other kinds of abetment.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Sir *Tej Bahadur Sapru*, Dr. *K. N. Katju*, Messrs. *A. P. Dube* and *Saila Nath Mukerji* and Miss *L. W. Clarke*, for the respondents.

KING and KISCH, JJ. :—This is an appeal by the Local Government against the acquittal of Chaube Dinkar Rao, Pandit Jagat Narain and Pandit Madan Mohan who were charged with an offence under section 161 read with section 116 of the Indian Penal Code.

The principal facts of this case are undisputed. Mr. Brij Behari Lal was the Subordinate Judge of Etawah in the Mainpuri judgeship. We shall call him hereinafter "the Judge". There was a suit in his court between Narain Rao, the father of Dinkar Rao accused, and a man named Gur Narain. The Judge had recorded all the evidence and heard the arguments and was preparing his judgment when Pandit Jagat Narain accused came to his house, on the 4th of July, 1931, and told him that the plaintiff Narain Rao would be prepared to give him Rs.10,000 if he would decree the suit. The Judge felt insulted and turned Jagat Narain out of the house. The same evening the Judge met the Collector, Mr. Barlow, and told him about the suggested bribe of Rs.10,000. Next day Mr. Mathur, the Sessions Judge, came to Etawah to hold sessions and the Judge told him also about the offer of a bribe. That afternoon the Judge, Mr. Barlow and Mr. Mathur met at the Collector's house and talked about the incident. Mr. Barlow remarked that the plaintiff Narain Rao was a defaulter to the extent of about Rs.10,000 in the payment of land revenue and had declared his inability to pay, but he was nevertheless prepared to pay Rs.10,000 as a bribe. He suggested to the Judge that if the plaintiff or his representative wanted to offer the money as a bribe the

Judge should not stop him but should take the money so that it might be applied in discharge of the plaintiff's arrears of land revenue. The three officials seemed to think that it would be rather a joke to let the plaintiff offer the money as a bribe and then to take it in payment of the land revenue which the plaintiff professed to be unable to pay.

Pandit Jagat Narain never appeared on the scene again, but a few days later Madan Mohan accused, who is a *pujari* and who was a witness of the plaintiff in the suit, came to see the Judge at his house. After some preliminary remarks the Judge told him that Pandit Jagat Narain had approached him with the offer of a bribe on behalf of the plaintiff Narain Rao. Madan Mohan said that Jagat Narain had no connection with the plaintiff and had probably been sent by the defendant in order to prejudice the plaintiff. The Judge then signified by his manner that he was willing to consider the question of taking a bribe. Madan Mohan then said that the plaintiff could not pay so much as Rs.10,000 but would be willing to pay about Rs.8,000. The Judge held out for Rs.12,000 and said that he was prepared to see the plaintiff if the latter was willing to pay that sum.

Two or three days later Madan Mohan came again and said that the plaintiff was prepared to pay Rs.12,000 and asked when he should bring it. The Judge was anxious that the money should be paid in the presence of Mr. Mathur, who was returning to Etawah in a few days, and so he put Madan Mohan off once or twice and finally arranged that the money should be paid to him at his house on the 12th of July at about 9.30 p.m. as Mr. Mathur was expected to arrive at Etawah on that day. The Judge then arranged with Mr. Barlow and Mr. Mathur that the bribe givers should be trapped when they came to pay the money. The Judge sat in the verandah of his house while Mr. Barlow, Mr. Mathur and the Tahsildar hid themselves inside the rooms. At about 9.30 p.m. on the 12th of July, Dinkar Rao, the plaintiff's son,

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came along with Madan Mohan and said that they had brought Rs.10,000 and promised to pay the balance of Rs.2,000 within two days. Dinkar Rao produced Rs.10,000 in currency notes which he handed over to the Judge, who counted them and put them in his pocket. He then lighted a cigarette, which was a pre-arranged signal to Mr. Barlow, Mr. Mathur and the Tahsildar, who thereupon came out from the house. The Judge continued to play his part and pretended to be very much upset at the arrival of these gentlemen. When the Collector asked Dinkar Rao what he meant by paying this money to the Judge, he replied after some hesitation that he had paid it by way of a loan. The Judge, however, said that the money had been brought as a bribe and it was no use trying to conceal the truth, so Dinkar Rao threw himself at the Collector's feet and asked for pardon. The Collector then said that he wanted the money for land revenue due from Narain Rao, and got Dinkar Rao to give his consent in writing that the money should be taken on account of revenue and irrigation dues on behalf of his father Narain Rao. The Collector then made over the notes to the Tahsildar. Mr. Mathur reported the facts to the High Court, and the Collector also made a report to the Commissioner. The result was that the accused were put on their trial along with Narain Rao, but were all acquitted by the learned Sessions Judge. No appeal has been filed against the acquittal of Narain Rao, so we are only concerned with the other three accused.

The case of Jagat Narain can be briefly dealt with. He admits that he went to the Judge and told him that the plaintiff would pay Rs.10,000 if the suit were decreed, but denies that he went on behalf of the plaintiff. He makes out that he was really an emissary from the defendant and that his object in going was to find out whether there was any danger of the Judge's accepting a bribe from the plaintiff. The learned Government

Advocate has to admit that there is no evidence whatever showing that Jagat Narain had any connection with Narain Rao or Dinkar Rao or Madan Mohan. He is not related to any of them and does not appear to be a friend of theirs. His explanation that he was really acting in the interests of the defendant finds some support from the fact that he is related to the defendant, Gur Narain. It is also significant that as soon as Madan Mohan heard that Jagat Narain had approached the Judge with the offer of a bribe from the plaintiff, he stated at once that Jagat Narain could not have come on behalf of the plaintiff and that he probably came merely to prejudice the plaintiff. However this may be, we must take it that Jagat Narain was not acting in concert with the plaintiff or with Madan Mohan and that his conversation with the Judge on the 4th of July has no connection whatever with Madan Mohan's visit to the Judge a few days later. We agree with the learned Sessions Judge that Jagat Narain cannot be held guilty of an offence under section 161 read with 116. He did not offer a bribe. All that he said was that the plaintiff would be willing to give Rs.10,000 if the Judge would decree the suit. On these facts he might have been held to have instigated the Judge to send for the plaintiff and ascertain whether he was in fact willing to pay the money as alleged. This might amount to instigating the Judge to *attempt* to commit an offence under section 161 of the Indian Penal Code, but no charge has been framed on these lines. We think it is clear that Jagat Narain's statement that the plaintiff would be willing to offer a bribe does not amount to the abetment of an offence under section 161, as he did not offer any bribe. He did not even expressly claim authority to speak as an agent or representative of the plaintiff, and it seems likely that in fact he came without the plaintiff's knowledge or consent. Whatever his real position or intention may have been, we hold that his statement, or expression of opinion, did not amount to abetment of an offence under section 161

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of the Indian Penal Code. At the most it only amounted to preparation for committing such abetment.

We now turn to the cases of Dinkar Rao and Madan Mohan. They undoubtedly consented to supply a sum of money to the Judge by way of illegal gratification and actually handed the money over to him. Their defence was that the money was given not as a bribe to the Judge but as a loan to a certain clerk named Ram Narain who was employed in the civil courts at Mainpuri. Some evidence has been adduced in support of this plea, but we do not think that the point is worth discussing in detail. Even according to their own account the loan was to be a mere pretence, as they knew that the money was really to be given to the Judge. The trial court rightly remarks: "The accused themselves admit that even if the money was advanced as a loan, the advance was made in order to please and accommodate the Subordinate Judge and it would matter very little whether the money was paid as a loan or as an undisguised bribe. In either case the payment would amount to an illegal gratification."

The trial court has acquitted Dinkar Rao and Madan Mohan on the ground that they cannot be held guilty of the abetment of an offence under section 161 of the Indian Penal Code, when they merely handed over the money in compliance with a demand from the Judge himself who never intended to take the money as a bribe. The learned Government Advocate has contested the finding that the Judge himself solicited a bribe, but we think that the trial court has taken a perfectly justifiable view. When Madan Mohan came to see the Judge, he never opened the question of bribery. It was the Judge himself who opened the question, and he has admitted that he indicated by his manner that he was prepared to receive a bribe. The mere fact that he did not ask for a bribe outright makes no difference. We take it that he certainly suggested to Madan Mohan that the offer of a

bribe would be acceptable. The question then is whether the accused, in complying with the Judge's demand for a bribe, were guilty of abetting an offence under section 161 of the Indian Penal Code although the offence was not committed in consequence of the abetment and although the Judge took the money without any guilty intention. The trial court has answered this question in the negative. We understand its view to be that if the Judge had accepted the money as a bribe (i.e. with a guilty intention) the bribe givers would be guilty of abetment, because they certainly would have aided the Judge to commit the offence of bribe taking. But as the Judge never intended to commit the offence of bribe taking, the bribe givers cannot be held to have *aided* him to commit that offence and therefore cannot be held guilty of abetting that offence.

The question is not free from difficulty, but we are unable to accept the trial court's view.

Section 107 of the Code explains that a person can abet the doing of a thing in three different ways, (1) by instigating a person to do it, (2) by conspiring with a person to do it, or (3) by intentionally aiding the doing of it. In the present case we agree that the accused cannot be held to have *instigated* the Judge to take a bribe because he had shown his willingness to accept a bribe, so there was no need to incite him or to urge him on to take a bribe. We also agree that the accused did not *conspire* with the Judge to commit the offence of bribe taking, as the Judge admittedly never consented to commit such an offence. Madan Mohan and Dinkar Rao, however, undoubtedly conspired together to offer the bribe to the Judge. This aspect of the case was not considered by the trial court. These two accused persons might therefore have been charged with conspiring together to offer the bribe. In other words they might have been charged with abetment (by conspiracy) of the abetment of an offence under section 161, but as they were not called

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upon to meet such a charge it is unnecessary for us to consider whether they might have been convicted on such a charge. On the charge as framed there was no abetment by conspiracy. Now remains the question of abetment by intentionally *aiding* the commission of the offence of bribe taking. Whether the accused are guilty of this form of abetment depends upon the interpretation of section 108 of the Indian Penal Code. This section enacts that "A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor." Explanation 2 shows that it is not necessary that the act abetted should be committed, and explanation 3 further states that it is not necessary that the person abetted should have any guilty knowledge or intention.

Applying the provisions of sections 107 and 108 to the abetment of bribe taking, we think it is clear that if the Judge had taken the money as a bribe (i.e. with guilty intention) then the bribe givers would have been guilty under section 109 of abetting an offence under section 161. They clearly would have aided the Judge to commit an offence under section 161 and the offence would have been committed with the aid which constituted the abetment. The trial court agreed to this conclusion and we express our opinion on this hypothetical case only because Sir *Tej Bahadur Sapru* has gone to the length of arguing that when a public servant solicits a bribe from a person then the latter commits no offence if he offers a bribe. The learned counsel was unable to explain how this contention could be justified by the language of the Code, but he relied upon the following extract from the explanatory notes made by the authors of the Code: "The person who, without any demand express or implied on the part of a public servant, volunteers an offer of a bribe, and induces that public servant to accept it, will be punishable under the

general rule as an instigator. But the person who complies with a demand, however signified on the part of a public servant, cannot be considered as guilty of instigating that public servant to receive a bribe. *We do not propose that such a person shall be liable to any punishment*, and, as this omission may possibly appear censurable to many persons, we are desirous to explain our reasons.'' It is interesting to note that the authors of the Code did not contemplate the punishment of a person who complies with a demand made by a public servant for a bribe, but it appears that their views were not accepted by the legislature. The Code does not give effect to their views. We are bound to give effect to the language of the statute and cannot give effect to draftsmen's views which were probably intentionally rejected by the legislature.

Turning now to the accepted facts of this case, we think that the bribe givers were guilty of abetment although the Judge took the money without any guilty intention. The bribe givers did not aid the commission of an offence, but they aided the Judge to commit an act (i.e. to take the money) which would be an offence if committed with the same intention as that of the bribe givers. Explanation 3 of section 108 makes it clear that the person abetted need not have any guilty intention in committing the act, so the fact that the Judge took the money without any guilty intention seems to be immaterial. His act would certainly have been an offence if committed with a guilty intention. As his guilty intention was immaterial we hold that the bribe givers are liable as abettors of an offence under section 161.

The trial court took the view that explanation 3 applies only to abetment by instigation and not to abetment by intentionally aiding. He pointed out that the illustrations to this explanation are all cases of instigation or of

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the commission of an offence by the so-called abettor through an innocent agent. We are not prepared to narrow down the meaning of this explanation as suggested. If the explanation had been intended to apply to abetment by instigation only, it would have been easy to substitute the words "instigated" and "instigator" for the words "abetted" and "abettor". It is clear, for example, that explanation 5 of section 108 applies only to abetment by conspiracy, but explanation 3 applies to abetment generally and there is nothing to indicate that it applies only to abetment by instigation and not to other kinds of abetment. The illustrations are obviously not intended to be exhaustive. In our opinion the bribe givers are not exonerated merely because the Judge took the money without any guilty intention. This view is supported by a decision of the Lower Burma Chief Court in *Emperor* v. *Nga Hnin* (1). In that case the accused persons handed a sum of money to a Magistrate as a bribe. The Magistrate at once called in witnesses and instituted a prosecution. The accused were acquitted on the ground that the Magistrate by his silence and conduct had induced the accused to offer him the bribe, so the accused could not be held guilty of instigating the Magistrate to receive the bribe. The learned Judge of the Chief Court pointed out that a person may abet not merely by instigation, but also by intentionally aiding, and made the following observations: "If a public servant solicits a bribe and the person solicited complies with the demand and hands him the money, he intentionally aids by his act, and therefore abets, the taking of the bribe by the public servant; the fact that the bribe was solicited at most renders the abetment less culpable than it would otherwise be." We are fully in agreement with this view. It must be noted that in this reported case also, although the Magistrate was held to have solicited the bribe, he clearly had no intention of receiving the money as a bribe, because he at once had

(1) (1917) 38 Indian Cases, 439.

the bribe givers arrested. If the public servant's intention, as the person abetted, is immaterial, we cannot escape the conclusion that the bribe givers are guilty of the offence of abetment, although they only complied with a demand made by the public servant, and although the public servant had no intention of receiving the money as a bribe.

It has been argued for Madan Mohan that he did not actually pay any money out of his own pocket to the Judge, and therefore he is not guilty of the offence charged. We are not impressed by this argument, because Madan Mohan negotiated the whole business with the Judge and with Dinkar Rao and was actually present when the bribe was given to the Judge. So we think he is as guilty of giving the money as Dinkar Rao who actually provided the money.

We hold, therefore, that Dinkar Rao and Madan Mohan are guilty of the offence charged, but the fact that the money was paid at the request of the Judge has an important bearing on the question of sentence. The learned Sessions Judge says that even if he had found them guilty, he would have passed a nominal sentence. We also think that only a very light sentence is called for. The accused acted on the suggestion of the Judge himself. They were tempted and caught in a trap. We agree with the trial court that the plan of tempting and trapping the accused was objectionable, and should not have been resorted to by an officer of the judicial department. We do not feel, however, that the bribe givers deserve much sympathy. They acted under no sort of compulsion, such as any fear that the Judge would show disfavour if not bribed. Finding that the Judge was apparently corruptible, they tried to win a weak case by dishonest means.

We dismiss the Government Appeal so far as Pandit Jagat Narain is concerned and confirm his acquittal. His bail bonds are cancelled. We allow the appeal so far as Dinkar Rao and Madan Mohan are concerned, set

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aside the order of acquittal and convict them of the offence under section 161 read with section 116 of the Indian Penal Code and sentence Dinkar Rao to a fine of Rs.200 or two months' simple imprisonment in default, and Madan Mohan to a fine of Rs.100 or one month's simple imprisonment in default. If the fines are paid the bail bonds are cancelled.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

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April, 11

SUNDAR DEVI (PLAINTIFF) *v.* DATTA TRAYA NARHAR AND ANOTHER (DEFENDANTS)*

Civil Procedure Code, section 132; *order V, rules* 3, 4—Pardanashin *lady—Cannot be compelled to attend court either as a party or as a witness.*

The exemption of *pardanashin* ladies from personal appearance in court, granted by section 132 of the Civil Procedure Code, is a right which no court has power to refuse, and applies to the parties as well as to witnesses. A *pardanashin* lady cannot be compelled to attend the court, either as a party under order V, rule 3 or 4 of the Civil Procedure Code, or as a witness.

The words "personal appearance" used in section 132 mean personal attendance. If a *pardanashin* lady observing strict *parda* is ordered to attend the court, it means that she is "compelled to appear in public". Her face may be covered or she may be wearing a *burka*, but all the same she is compelled to appear in public if she is ordered to attend the court. This is against the spirit of section 132.

Mr. *A. Sanyal*, for the appellant.

Dr. *N. U. A. Siddiqi* and Mr. *Kedar Nath Sinha*, for the respondents.

RACHHPAL SINGH, J.:—This is a plaintiff's appeal arising out of a suit which she instituted against the

*First Appeal No. 433 of 1929, from a decree of Hari Har Prasad, Subordinate Judge of Jaunpur, dated the 5th of January, 1929.

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defendants Nos. 1 and 2 in the court of the Subordinate Judge of Jaunpur and which has been dismissed. The plaintiff is one Mst. Sundar Devi. Datta Traya Narhar, defendant No. 1, is a solicitor practising in Bombay. According to the plaintiff, Parmeshwar Din defendant No. 2 is an agent of the defendant No. 1.

Rachhpal Singh, J.

On the 23rd of November, 1927, the defendant No. 1 obtained a decree from the Bombay High Court for a sum of money against Mst. Sundar Devi, plaintiff. The plaintiff, who resides in Benares, instituted a suit against the two defendants in the court of the Subordinate Judge of Jaunpur to obtain a declaration to the effect that the aforesaid decree, for the reasons given in her plaint, was not binding upon her. After the issues had been settled in the case, a commission was issued for recording the evidence of the plaintiff and one Mst. Lakhpati at Benares. The statement of the plaintiff was recorded. While Mst. Lakhpati was being examined it was suspected by the counsel for the defendants that there was some one else with Mst. Lakhpati Devi behind the *parda*, who was tutoring her. This suspicion of the defendants' counsel was brought to the notice of the Commissioner. The Commissioner went behind the *parda* and found one person ascending the staircase near the spot where Mst. Lakhpati had been sitting. The defendants' counsel stopped further cross-examination of Mst. Lakhpati and made a written application to the Commissioner to report the matter to the court. This application was made on the 22nd of September, 1928. The Commissioner sent the record to the court.

On the 20th of November, 1928, the defendants made an application to the court mentioning the above mentioned facts and praying that they should be given an opportunity to further cross-examine not only Mst. Lakhpati but also the plaintiff. They asked the court to order that both the plaintiff and Mst. Lakhpati should

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present themselves in Jaunpur where they might be further examined in *parda* either in court or some other suitable place. The court directed the plaintiff to file written objections by the 29th of November, 1928. No objections were filed on behalf of the plaintiff. But it may be pointed out that on the 11th of November, 1928, after the Commissioner had returned the commission, the plaintiff had made a petition to the court. In that petition, while denying the allegations of the defendants that there had been any tutoring of Mst. Lakhpati behind the *parda*, she expressed her readiness to tender Mst. Lakhpati for further cross-examination if so ordered. * * * * Ultimately the Subordinate Judge directed the plaintiff to attend the court on the 5th of January, 1929. In this order, he stated as follows: "The conduct of the plaintiff as reported by the Commissioner is highly objectionable. The only course open is now to direct the plaintiff, Mst. Sundar Devi, to attend in person on the 5th instant, when she will be questioned about the case on the points raised by the defendants. Further orders shall be made on that date. In case of non-appearance she will bear the legal consequences." On the 5th of January, 1929, the plaintiff did not appear. The learned Subordinate Judge dismissed the suit. The court below in its judgment says that "as she had not entered appearance as directed, the suit is dismissed for default of prosecution with costs." The present appeal has been preferred by the plaintiff against this order of dismissal of her suit.

I am of opinion that the order of the learned Subordinate Judge is wrong and cannot be sustained. Section 132 of the Code of Civil Procedure lays down that women who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal attendance in court. The exemption from personal appearance under this section is a right which no court has power to refuse, and

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applies to the parties as well as witnesses. In a Madras case, *Vellai Nachiar* v. *Meiyappa Chetty* (1), it was held that the lower court was clearly wrong in seeking to compel the personal attendance in court of a *pardanashin* lady. I may say here that in a Calcutta case, *In re Bilasroy Serowgee* (2), a single Judge of that Court took the view that the word "appearance" means that a *pardanashin* lady shall not be compelled to come forth into view or to become visible to the public gaze and that the court, therefore, has powers to order a *pardanashin* lady to give evidence in court provided she is not compelled to become visible to the public gaze. With all possible respect to the opinion of the learned Judge, I am of opinion that the view taken by him is not correct. The words used in section 132 of the Code of Civil Procedure are that women who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal attendance in court. The words "ought not to be compelled to appear in public" are important. If a *pardanashin* lady observing strict *parda* is ordered to attend the court, it means that she is "compelled to appear in public". Her face may be covered or she may be wearing a *burka*, but all the same she is compelled to appear in public if she is ordered to attend the court. This is against the spirit of section 132 of the Code of Civil Procedure. In families in which ladies observe strict *parda* it is considered most objectionable for them to appear in public even with their faces covered. I am of opinion that the words "personal appearance" used in section 132 mean "personal attendance". In this connection we may look to rule 1, order XXVI of the Code of Civil Procedure which empowers a court to issue commission for the examination of witnesses who are exempted under this Code from attending the court. Among those so exempted are women who, according to the customs and manners of the country, ought not to be compelled to appear in

(1) (1924) 86 Indian Cases, 513. (2) (1929) I.L.R., 56 Cal., 865.

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public. A court has no power to insist that a *pardanashin* lady must attend and give evidence in court. It is the right of a *pardanashin* lady to refuse to attend the court and to say that if she is to be examined, her statement should be taken on commission. If the view taken by the Calcutta High Court in the aforesaid case were correct, rule 1 of order XXVI of the Code of Civil Procedure would become useless. I hold that the correct view is that under the provisions of section 132, clause (1) of the Code of Civil Procedure, a *pardanashin* lady cannot be compelled to attend the court either as a party or as a witness. I, therefore, decide that the learned Subordinate Judge acted wrongly in going against the provisions of section 132 of the Code of Civil Procedure in insisting on the personal attendance of the plaintiff in court.

It was urged by the learned counsel appearing for the defendants that the court had the power to order the plaintiff to attend under the provisions of rule 3, order V of the Code of Civil Procedure. I am of opinion that rule 3, order V of the Code of Civil Procedure is confined to those cases in which the court, before issues are framed, desires, for some reason, the personal attendance of a party. In the case under appeal that stage had passed. Nor do I think a court, acting under rule 3, order V of the Code of Civil Procedure, can compel the attendance of a party who is a *pardanashin*. Such an order would be against the provisions of section 132, clause (1) of the Code of Civil Procedure. It was also contended on behalf of the respondents that the court acted under rule 4, order X of the Code of Civil Procedure. I disagree with this contention. Under this rule a court can order the attendance of a party only where his or her counsel is unable to answer material questions. In the case before us the record does not show that the counsel appearing for the plaintiff was unable to answer any questions which the court put or wished to put to

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him. I also think that under the provisions of rule 4, order V of the Code of Civil Procedure the court cannot insist on the personal attendance of a party who is a *pardanashin* lady.

Rachhpal Singh, J.

Coming to the merits of the case, I am clearly of opinion that the order of the learned Subordinate Judge directing the personal attendance of the plaintiff was unwarranted. The statement of the plaintiff had been finished before the Commissioner. When Mst. Lakhpati was being cross-examined, the counsel for the defendants suspected that there was some one behind the *parda* along with the witness who was perhaps tutoring her. The cross-examination was stopped and the matter was reported to the court. The plaintiff put in an application denying the allegations of the defendants. That application is dated the 11th of November, 1928, and is on the record. If the learned Subordinate Judge thought that there was any substance in the allegations of the defendants, he could have directed her evidence being recorded again with such precautions and safeguards as seemed reasonable consistently with her right to be exempt from appearance in court. It was also open to him to refuse to admit the statement of Mst. Lakhpati in evidence, if he considered that a case had been made out for its exclusion. Where a fraud of the kind alleged by the defendant is established, the court has undoubtedly the discretion to exclude the evidence. But there was no justification for the learned Subordinate Judge to insist on the attendance of the plaintiff in court.

* * * * *

For the reasons given above, I am of opinion that the decree passed by the court below is bad and must, therefore, be set aside. The appeal is allowed and the decree passed by the learned Subordinate Judge is set aside. The defendants will pay the costs of the appellants in this Court.

NIAMAT-ULLAH, J. :—I concur.

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April, 12

Before Mr. Justice Niamat-ullah and Mr. Justice Bennet

HARAKH NARAIN SINGH AND ANOTHER (DEFENDANTS) *v.* BABBAN AND OTHERS (PLAINTIFFS)*

Civil Procedure Code, section 98(2)—*Difference of opinion among members composing a Bench—Decree to be varied so far as the members composing the Bench agree to vary it and confirmed as regards the rest—"Decree"*.

In cases where the two Judges composing a Bench hearing an appeal are not unanimous, the decree appealed from should be varied to that extent to which the members composing the Bench agree that it should be varied and the rest of the decree should be confirmed.

Where the decree appealed from is the result of adjudications regarding several items, each adjudication is to be deemed a "decree" for the purpose of section 98(2) of the Civil Procedure Code and the provisions of that section should be applied with reference to the adjudication of each item.

THIS appeal arose out of a suit to enforce a hypothecation bond against the sons of the original executant. The principal sum secured was Rs.4,999, out of which an item of Rs.723-12-0 had admittedly not been paid; so that the actual amount advanced was Rs.4,275-4-0. The question was how much of this sum was recoverable as being justified by legal necessity or antecedent debt. The court of first instance found that except for Rs.357 the whole of the amount was for legal necessity or antecedent debts, and, being of opinion that the Rs.357 was comparatively an insignificant amount, it decreed the suit for Rs.4,275-4-0 and interest. The defendants filed an appeal to the High Court, which was heard by a Bench of two Judges. One of the Judges came to the conclusion that out of the principal, Rs.2,275-4-0 was supported by legal necessity or antecedent debt, and the other Judge came to the conclusion that the whole of the principal except Rs.340 was

*First Appeal No. 183 of 1930, from a decree of Ali Muhammad, Additional Subordinate Judge of Gorakhpur, dated the 23rd of December, 1929.

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so supported. The question then arose as to what, in these circumstances, should be the decision in the appeal.

Mr. *Ram Nama Prasad*, for the appellants.

Sir *Tej Bahadur Sapru* and Mr. *Mukhtar Ahmad*, for the respondents.

NIAMAT-ULLAH and BENNET, JJ. :—The two Judges composing the Bench have arrived at different conclusions as regards the amount for which a decree should be passed in favour of the plaintiffs. The lower court decreed the plaintiffs' claim in its entirety. One of us would decree it only to the extent of Rs.2,275-4-0; while the other would uphold the lower court's decree except as regards Rs.340. The question is whether the decree appealed from should be varied so far as the Judges composing the Bench agree that it should be varied and the appeal dismissed as regards the rest, or whether the appeal should be dismissed *in toto*.

Section 98 of the Civil Procedure Code is so worded as to make it arguable that unless the majority of the Judges composing a Bench agree in varying or reversing the decree appealed from, it should be maintained. An opinion to this effect was expressed in *Punjab Akhbarat and Press Co.* v. *Ogilvie* (1). On the other hand, it was definitely held in *Rajagopala Naidu* v. *Subbammal* (2), that the decree appealed from should, in such a case, be varied in so far as the Judges composing the Bench agree to vary it and should be confirmed as regards the rest. It seems to us that this view is more in accord with justice and common sense and should be adopted if the language of the section makes it permissible to do so. We are of opinion that section 98(1) and (2) can be so interpreted as to support the view taken by the Madras High Court. The learned Judges have given their reasons for adopting the same, and we do not consider it necessary to repeat them. We would, however, add some of our own.

(1) (1925) I.L.R., 7 Lah., 179. (2) (1927) I.L.R., 51 Mad., 291.

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Section 98(2) provides: "Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed." The word "decree" is defined in section 2(2) to mean "the formal expression of an adjudication which . . . conclusively determines the rights of the parties with regard to all or any of the matters in controversy in suit . . ." The word "judgment" is defined in section 2(9) as "the statement given by the Judge of the grounds of a decree or order."

It seems to us that the word "decree" occurring in section 98(2) of the Civil Procedure Code does not mean the document described by that name, but "the formal expression of an adjudication" as regards "all or any of the matters in controversy in suit". If there are several matters in controversy in a suit, the formal expression of adjudication as regards each of those matters is a "decree" so that, in that sense, adjudication as regards every item in dispute between the parties is a decree. Where the Judges composing a Bench do not agree in confirming the adjudication made by the lower court in respect of one item, such decree or adjudication relating to that item shall be confirmed. At the same time, if they agree in reversing the decree or adjudication by the lower court as regards another item in dispute, the decree in respect of such item shall be varied. In this view, where the document described as the "decree" contains adjudications regarding several items, each adjudication is a decree as defined in section 2(2), and the provisions of section 98 of the Civil Procedure Code should be applied with reference to the adjudication of each item.

In *Krishen Doyal Gir* v. *Irshad Ali Khan* (1) the same view seems to have been taken, though there is no discussion of the reasons on which it proceeds.

(1) (1915) 31 Indian Cases, 965.

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For the reasons stated above we allow the appeal so far as to modify the decree appealed from by reducing the plaintiffs' claim to the extent of Rs.340, besides interest and compound interest. The parties shall receive and pay costs in proportion to success and failure.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

DWARKA DAS (DEFENDANT) *v.* KISHAN DAS (PLAINTIFF)* 1933 *April*, 12

Hindu law—Father's debts—Suretyship debt—Father standing security for payment of money—Son's liability not dependent on whether the father had received consideration for standing security.

Under the Mitakshara law the liability of a son for the payment of a debt incurred by the father by way of standing surety for the payment of a sum of money is independent of whether any consideration had been received by the father.

According to the texts of the Mitakshara the liability of the surety himself exists, for the payment of the debt incurred by becoming surety, where the surety is for appearance, for confidence or for payment; the liability of the son exists in the case of surety for payment. But if the surety for appearance or for confidence had bound himself after taking some property in pledge, then his sons also must pay the suretyship debt, from the property taken in pledge. The case of the grandson is different, and apparently there is no liability on him in any case.

Sir *Tej Bahadur Sapru*, Mr. *Hari Ram Jha* and Miss *S. K. Nehru*, for the appellant.

Dr. *K. N. Katju* and Mr. *M. N. Kaul*, for the respondent.

SULAIMAN, C. J., and RACHHPAL SINGH, J. :—This is a defendant's appeal arising out of a suit for recovery of about Rs.12,000 with interest on the basis of a security bond dated the 24th of June, 1922, executed by the

*First Appeal No. 463 of 1929, from a decree of J. N. Kaul, Additional Subordinate Judge of Benares, dated the 19th of July, 1929.

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deceased father of the minor defendant. The plaintiff's case is that on the death of the grandfather, Ganesh Das, during whose lifetime his son Gokul Das (the father of the defendant) had already separated, there was a dispute between the other two sons, Kishun Das and Ram Das, relating to the partition of the family property. This suit ultimately resulted in a written compromise which was dated the 24th of June, 1922, and was filed in court on the 26th of June. The last portion of this compromise, the interpretation of which is in dispute, referred to a security bond to be executed by Gokul Das. Gokul Das executed the security bond sued upon on the 26th of June, 1922, and admittedly handed it over to the plaintiff Kishun Das. The court passed a decree in terms of the compromise on the 4th of July, 1922. An attempt was made to get the security bond executed by Gokul Das registered, but on objection being raised by Gokul Das the registration was refused. On the death of Gokul Das, the present suit was instituted for the enforcement of his liability under the security bond against his minor son.

The claim was resisted by the defendant on various grounds, the principal ones of which were: (1) The defendant was not bound to discharge the debt at all under the Hindu law.

[The other grounds, which are not material for the purpose of this report, are here omitted. Portions of the judgment dealing with those grounds are also omitted.]

The last point urged by Sir *Tej Bahadur Sapru* on behalf of the defendant is that there can be no liability of the son for the payment of a debt incurred by reason of suretyship when it is not shown that consideration had been received by the father. It is conceded that in a large number of cases the liability of the Hindu son for the debt due by the father as surety has been accepted.

We may mention the case of *Maharaja of Benares* v. *Ramkumar Misir* (1), following the cases of *Tukaram Bhat* v. *Gangaram Mulchand* (2) and *Sitaramayya* v. *Venkatramanna* (3). There are other cases as well. We may mention the latest cases of this Court, namely *Salig Ram Misir* v. *Lachhman Das* (4) and *Toshanpal Singh* v. *District Judge of Agra* (5).

It is not necessary to consider in this case whether such a liability justifies an alienation by a Hindu father straight off, and the less so if he has grandsons. On this point there is some difference of opinion in the two cases of this Court quoted just above. The Calcutta High Court in *Hira Lal Marwari* v. *Chandrabali Haldarin* (6) seems to have adopted the view expressed in the first mentioned case.

But the learned advocate has argued that there is an exception to this general rule which was not pressed in these cases. He relies strongly on the case of *Narayan* v. *Venkatacharya* (7) and particularly on the observations of CHANDAVARKAR, J., at page 411 that "The law as laid down in the Mitakshara, by which the parties are governed, is that a grandson is not liable to pay a debt which his grandfather contracted as a surety unless the latter in accepting the liability of a surety received some consideration for it." It is urged that the same principle applies to the case of a son.

In the first place, the observations of the learned Judge were confined to the liability of a grandson and as undoubtedly there is some distinction between the liability of a grandson and that of a son under the Hindu law so far as the debt of the father as a surety is concerned, this case cannot be accepted as any authority for the liability of the son. In the next place, with great respect to the learned Judge, there seems to have been some mistake in

(1) (1904) I.L.R., 26 All., 611.
(2) (1898) I.L.R., 23 Bom., 454.
(3) (1888) I.L.R., 11 Mad., 373.
(4) (1927) I.L.R., 50 All., 211.
(5) (1928) I.L.R., 51 All., 386.
(6) (1908) 13 C.W.N., 9.
(7) (1904) I.L.R., 28 Bom., 408.

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assuming that the law is laid down in those terms in the Mitakshara. As a matter of fact, we can find no passage therein where the liability of the grandson to pay the debt of a grandfather, contracted as a surety, is subject to the receipt of consideration.

The subject is dealt with at length in chapter VI, section 4 of the Mitakshara which deals with sureties and their liability. Placitum 53 says: "Suretyship is enjoined for appearance, for confidence and for payment. On failure of either of the first two, the surety (himself) in each case shall pay; on that of the third, his sons also must pay." Again placitum 54 says: "If a surety for appearance or for confidence die, the sons have not to pay; in the case of a surety for payment the sons have to pay." These texts are very clear and they lay down that the sons are liable to pay the debt of their father incurred as a surety for payment. In the note No. 12 there is a reference to a pledge. It is in these terms: "If the surety for appearance or for confidence binds himself after taking sufficient pledge, then his sons also must pay the debt incurred by becoming surety, from the property taken in pledge." This note applies to the case of the surety for appearance or for confidence and does not on the face of it apply to a surety for payment of a debt. That this is so is further supported by the passage quoted from Katyayana as an authority for this statement of the law: "Should a man become a surety for the appearance of a debtor from whom he had received a pledge (as his own security), his son, on the demise of his father, may be compelled to pay the debt from the pledged property." The comment goes on to add: "Here security for appearance includes a security for confidence." There is no reference to security for payment. It follows that it is not correct to say that in the Mitakshara it is laid down that the liability of the son for payment of his father's debt as surety is confined to the case where sufficient pledge has been taken. As regards the grandsons there seems to be no liability at all.

The Mitakshara is a book of the highest authority in the Benares school, and even if there were more ancient texts capable of being interpreted in a different way, we would be bound to accept the interpretation put upon these texts in the Mitakshara. Similarly even if the law were differently interpreted in the Bombay school (Mayukha) or the Bengal school (under the Dayabhaga) we would be bound to give preference to the view expressed in the Mitakshara. But as a matter of fact, we do not find that the law has been differently laid down either in the more ancient texts or in the Bombay school. Admittedly the chapter on debts in the Dayabhaga is not extant, and there is accordingly no discussion of this question in that treatise.

In the Laws of Manu (Colebrooke's Hindu Law, Volume I, page 173, 3rd edition) after reciting that the son of the surety shall not in general be obliged to pay money due by a surety it is stated: "Such is the rule in case of a surety for appearance or good behaviour; but if a surety for payment should die, the Judge may compel even his heirs to discharge the debt." There is no exception laid down as regards the receipt of consideration.

It is not necessary to refer to the opinion of Gautam who was apparently inclined to the view that there is no liability in any case. In the Institutes of Vishnu (Max Muller's Sacred Books of the East, Volume VII, page 46, chapter VI, verse 41) it is stated: "Suretyship is ordained for appearance, for honesty, and for payment: the first two (sureties, and not their sons), must pay the debt on failure of their engagements, but even the sons of the last (may be compelled to pay it)." There is no exception laid down as regards the receipt of consideration.

The contention that there is such an exception is mainly based on the statement of the law as laid down in the Mayukha (Stokes' Hindu Law Books), chapter V,

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section 3, paragraph 1. It lays down that sureties are of three kinds according to Yajnavalkya. It then proceeds to illustrate the three kinds of sureties. Paragraph 2 deals with the liability of the sureties themselves and then of their sons. Quoting Katyayana it is stated: "Money due by a surety need not, on any account, be paid by his grandsons, but in every instance such a debt incurred by his father must be made good by a son without interest." Then the text of Vyasa is quoted under which a grandson is not liable. We then come to paragraph 3 which is in these terms: "This however, supposing the security to have been undertaken by him without receipt of property (or consideration) in return; for if he received (any) property as an inducement to become surety, in that case the sum for which he was bound shall be paid, with interest, by his sons or grandsons. And accordingly Katyayana declares: 'Should a man become surety for the appearance of a debtor, from whom he had received a pledge (as his own security), the creditor (if that surety die), may compel his son to pay the debt, even without assets left by his father.' " In our opinion this exception does not mean that even the liability of the son does not arise unless there has been a receipt of property or consideration by the father. It merely states that the law laid down in the previous paragraphs was as regards the liability of the father, his sons and grandsons on the assumption that there had been no such consideration. When there is no such consideration, the father is liable and so are the sons for the principal, but not the grandsons. The exception, however, is "if he received any property as an inducement to become surety; in that case, the sum for which he was bound shall be paid with interest by his sons or grandsons." That is to say, in case there has been a receipt of consideration the sons and grandsons, both, are liable to pay the principal with interest. Thus the exception imposes a further liability on the grandsons in the event of there having been consideration

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and does not in any way diminish the liability of the sons if there had been no consideration. It is thus obvious that the text of the Mayukha cannot be cited in support of the contention urged on behalf of the appellant.

As a matter of fact, the law as laid down in the Mayukha appears to be somewhat different from that laid down in the Mitakshara and accordingly we are bound to accept the interpretation of the law as laid down in the latter book. Under the Mitakshara the liability of the surety himself exists for the payment of the debt where the surety is for appearance, for confidence or for payment; the liability of the son exists in the case of surety for payment, but the liability of the grandsons for the payment of the debt incurred as surety does not exist. But if the surety for appearance or for confidence had bound himself after taking pledge, then his sons also must pay the debt incurred by becoming surety, from the property taken in pledge.

The case before us is that of the liability of the son of the surety and not of his grandson. We have accordingly no hesitation in holding that the liability can be enforced against the defendant appellant.

In our opinion, therefore, the decree of the court below was correct. The appeal fails and is dismissed with costs.

APPELLATE CRIMINAL

Before Mr. Justice Thom and Mr. Justice Bennet

EMPEROR *v.* YASHPAL*

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April, 12

Criminal Procedure Code, sections 236, 237(1) *and* 307(3)—*Trial by Jury—Reference by Sessions Judge against verdict of jury—Power to convict, on such reference, on a charge which was not framed but could have been framed—Arms Act* (*XI of* 1878), *sections* 19(*f*) *and* 20.

In a trial by jury on a charge under section 19(*f*) of the Arms Act the jury, by a majority of four to one, gave a verdict

*Criminal Appeal No. 358 of 1932, from an order of Tej Narain Mulla, Sessions Judge of Allahabad, dated the 7th of March, 1932.

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of acquittal. The Sessions Judge, disagreeing with the verdict, referred the case to the High Court. The High Court came to the conclusion that the accused was guilty not only of an offence under section 19(*f*) of the Arms Act but also of an offence under section 20 of that Act. *Held* that the High Court had power, under section 307(3) read with sections 236 and 237(1) of the Criminal Procedure Code, to convict the accused also of an offence under section 20 of the Arms Act, although no charge under that section had been framed at the trial.

Messrs. *Kumuda Prasad, Binod Behari Lal, Vishwa Mittra* and Miss *S. K. Nehru*, for the appellant.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

THOM and BENNET, JJ. :—This is a reference by the learned Sessions Judge of Allahabad in a case in which the jury by a majority of four to one acquitted one Yashpal of a charge under section 19(*f*) of the Indian Arms Act, and the learned Sessions Judge has recommended that the accused should be convicted as in his opinion the verdict of the majority of the jury is perverse. There is also before us an appeal by Yashpal of a conviction by the learned Sessions Judge under section 307 of the Indian Penal Code and a sentence of seven years' rigorous imprisonment. The two proceedings relate to the same transaction and there was one trial in which the jury were assessors in the charge under section 307 of the Indian Penal Code.

[A portion of the judgment, not material for the purpose of this report, is here omitted.]

With regard to the reference by the learned Sessions Judge the facts which we have set forth convince us that the finding of the jury was perverse. The evidence of Mr. Pilditch shows that the accused was in possession of a revolver and he has further stated that that revolver is a Government revolver and has marks on it which show that the revolver and the barrel were condemned by the Arsenal. The procedure is that such condemned

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weapons should be broken up, but by some improper acts this revolver was not broken up, and has passed into the possession of the accused. The accused has not pleaded that the revolver was not in his possession and clearly, therefore, the accused was guilty of the offence of illegal possession of this revolver as he has not pleaded that he has a license. One further point remains. The Magistrate, Mr. Crofts, framed a charge only under section 19(*f*) of the Indian Arms Act for possession of the revolver and did not add to the charge that the possession was in such a manner as to indicate an intention that the possession might not be known to public servants and thus bring the charge within the further provisions of section 20 of the Indian Arms Act. The learned Sessions Judge, Mr. Mulla, also failed to amend the charge in that respect. We would invite the attention of these two officers to the fact that the charge should have been framed under section 19(*f*) and under section 20 of the Indian Arms Act. Under these circumstances the question is what action we should take in the matter. Section 307(3) of the Criminal Procedure Code lays down that the High Court when dealing with a reference by a Sessions Judge from the verdict of a jury may convict the accused person of any offence of which the jury could have convicted him upon the charge framed and placed before it. Section 236 of the Code of Criminal Procedure lays down that "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged . . . in the alternatve." Section 237(1) lays down that "If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it." We consider that the jury might have convicted the accused on the present charge

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under section 19(*f*) read with section 20 of the Indian Arms Act. We consider that, as a matter of fact, the ingredients of section 20 are proved in the present case. The accused person had this revolver in his possession and when the police appeared he attempted to run away with his revolver and he also attempted to shoot Mr. Pilditch with his revolver. His intention therefore was that his possession of the revolver might not be known to the police, that is, that he might make his escape with the revolver. Accordingly we convict the accused Yashpal under section 19(*f*) read with section 20 of the Indian Arms Act and sentence him to seven years' rigorous imprisonment. This sentence will be consecutive with the sentence passed under section 307 of the Indian Penal Code.

REVISIONAL CIVIL

Before Mr. Justice Young

MOOL CHAND (DEFENDANT) *v.* GANGA SAHAI (PLAINTIFF)*

1933
April, 13

Civil Procedure Code, order IX, rules 3, 4—*Suit restored after dismissal for default—Notice of date of hearing of restored suit not given to defendant*—Ex parte *decree set aside for want of notice.*

A suit was dismissed for default of appearance of both parties. Notice of the plaintiff's application for restoration was served on the defendant but he did not appear at the hearing of the application. The application was granted and a date was fixed for hearing of the suit. The defendant had no knowledge of this date and did not appear, and the suit was decreed *ex parte*. *Held*, setting aside the *ex parte* decree, that the defendant was of right entitled to notice of the date of hearing of the suit after restoration, and the necessity to serve such notice was not obviated by the fact that the defendant had knowledge of the original hearing and of the application for restoration.

*Civil Revision No. 498 of 1932.

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MOOL CHAND v. GANGA SAHAI

Mr. *G. S. Pathak*, for the applicant.

Mr. *S. B. L. Gaur*, for the opposite party.

YOUNG, J.:—This is an application in revision from the decision of the learned Subordinate Judge of Aligarh. The plaintiff brought a suit for salary, and notice was served on the defendant. On the 20th of April the case was fixed for hearing further evidence. Neither the plaintiff nor the defendant appeared, and the suit was dismissed for default. On the 27th of June an application by the plaintiff was heard asking for restoration. Notice of that application was served on the defendant. On the 27th of June, however, the defendant did not appear. The application for restoration was allowed and the 29th of June was fixed for the hearing. Of this date, the 29th of June, the defendant had no notice. The case was decided in favour of the plaintiff on the 29th of June, and the defendant applied on the 12th of August for restoration of the case. He filed an affidavit saying that he had no knowledge whatever of the case, until the 5th of August. The learned Judge, however, decided that as the defendant had knowledge of the original hearing and of the application for restoration, it was unnecessary that he should have notice of the date, the 29th of June, when the actual hearing took place. The defendant has applied in revision against this order dismissing his application for restoration.

The sole point in this case is whether the learned Judge was right in deciding that it was not necessary to serve notice on the defendant of the date of hearing of the case after restoration. Counsel for the respondent here has relied upon the case of *Birj Lal* v. *Bua Ram* (1). In that case a learned Judge of this Court decided that where neither the plaintiff nor the defendant had appeared on the date fixed originally for the hearing of the case, the defendant was not entitled to notice of the date fixed for hearing the application for restoration by the plaintiff.

(1) (1912) 10 A.L.J., 399.

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MOOL CHAND v. GANGA SAHAI

This case is no authority for the proposition that no notice is necessary for the hearing of the case itself after restoration.

It appears to me that apart from authority, I cannot possibly decide that a defendant is not entitled to notice of the hearing of the case against him. In this case both the plaintiff and the defendant were absent on the original hearing. When the plaintiff is allowed a second chance by having the application for restoration granted, it appears to me inequitable that the defendant should not have notice of the date fixed for the hearing. Apart from authority, therefore, I decide that in any such case the defendant is of right entitled to notice of the hearing of the suit. In this case the learned Judge came to the conclusion that the defendant did have notice in fact of the hearing, although no notice had been served on him, on the bare statement of the plaintiff in an application that the defendant's man had been watching the proceedings on all the dates. The defendant has stated on oath that he had no knowledge. It is impossible to take a mere statement in an application against an oath. I therefore hold that the defendant did not have knowledge of the proceedings on the 29th of June, and accepting the application in revision, set aside the order of the learned Judge of the small cause court and direct that the suit be restored and decided according to law. Costs will abide the event.

APPELLATE CIVIL

1933
April, 19

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Young

RAM GHULAM AND ANOTHER (PLAINTIFFS) *v.* SHYAM SARUP AND OTHERS (DEFENDANTS)*

Civil Procedure Code, section 92—Suit relating to public trust —Death of one of the two plaintiffs appellants pending appeal—No abatement of appeal.

The death, during the pendency of an appeal, of one of the two plaintiffs appellants who instituted a suit under the provisions of section 92 of the Civil Procedure Code does not affect the maintainability of the appeal, although no person is brought on the record in place of the deceased plaintiff appellant.

Where the suit has been properly instituted according to section 92 of the Civil Procedure Code, there is nothing in that section which says that the suit cannot be continued if one of the original plaintiffs who instituted the suit in the manner laid down by law happens to die. *Raja Anand Rao* v. *Ramdas Daduram* (1), relied on; *Chhabile Ram* v. *Durga Prasad* (2), dissented from.

Mr. *B. E. O'Conor*, Dr. *S. N. Sen* and Messrs. *G. Agarwala* and *Kishun Lal*, for the appellants.

Messrs. *S. C. Das*, *Hazari Lal Kapoor*, *S. B. Johari*, *G. S. Pathak*, *P. M. L. Verma* and *U. S. Gupta*, for the respondents.

MUKERJI and YOUNG, JJ.:—This appeal arises out of a suit instituted under section 92 of the Code of Civil Procedure by two individuals, one of whom has died since the institution of this appeal. A preliminary objection has been taken by the respondents that the appeal should fail because one of the two original appellants is dead, and section 92 of the Code of Civil Procedure lays down that at least two persons shall institute the suit under that section. We have heard the learned counsel for the respondents at length on this point, but we are of opinion that on a simple reading of section 92 of the Code of Civil Procedure the

*First Appeal No. 110 of 1930, from a decree of P. C. Plowden, District Judge of Bareilly, dated the 23rd of December, 1929.

(1) (1920) I. L. R., 48 Cal., 493. (2) (1915) I. L. R., 37 All., 296.

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hearing of this appeal cannot be barred. All that the section says is "Two or more persons . . . . may institute a suit." Where the suit has been properly instituted according to section 92 of the Code of Civil Procedure, there is nothing in that section which says that the suit cannot be continued if one of the original plaintiffs who instituted the suit in the manner laid down by law happens to die. Although this is our plain reading of the section, it appears that there is a conflict of opinion on this point. It would serve no useful purpose to quote the different cases cited to us. In our High Court in *Chhabile Ram* v. *Durga Prasad* (1) two learned Judges held that if one of the plaintiffs in a suit instituted under section 92 of the Code of Civil Procedure dies, the suit would abate. It was, however, remarked that it would be open to any other member of the public interested in the subject matter to obtain the consent of the Advocate-General and to apply to be brought on the record as a co-plaintiff.

The conflict among the High Courts is, however, set at rest by a decision of their Lordships of the Privy Council in *Raja Anand Rao* v. *Ramdas Daduram* (2). It was argued before their Lordships that because one of the plaintiffs had died the suit was not maintainable. The argument, however, was not accepted. Their Lordships at the bottom of page 497 are reported to have remarked as follows: "There was also a point that one of the persons who originally raised the suit and got the sanction having died, the suit could not go on; but there does not seem any force in that point either, it being a suit which is not prosecuted by individuals for their own interests, but as representatives of the general public." After this pronouncement on the part of their Lordships, we must hold and do hold that the law laid down in *Chhabile Ram* v. *Durga Prasad* (1) is no longer good law.

[The judgment then proceeded to decide the appeal on the merits.]

(1) (1915) I.L.R., 37 All., 296. (2) (1920) I.L.R., 48 Cal., 493.

APPELLATE CRIMINAL

Before Mr. Justice Thom and Mr. Justice Bennet

1933
April, 20

EMPEROR *v.* SHEO DAYAL AND OTHERS*

Indian Penal Code, sections 142, 149—*Rioting with murder, dacoity and arson—Part played by each member not necessary to be proved—Evidence Act (I of* 1872), *section* 106—*Burden of proof—Intention—Criminal Procedure Code, sections* 417, 418—*Appeal against acquittal—Function of appellate court in such appeal—Criminal Procedure Code, section* 162—"*Refer to such writing*".

In a case of rioting with murder, dacoity and arson the prosecution is not called on to prove the part which each accused person took in the riot. The prosecution has to prove in the first place that there was an unlawful assembly and that the unlawful assembly committed various offences of riot, looting, arson and murder; and, further, that each accused person was a member of the unlawful assembly. Having proved so much, the provisions of section 149 of the Indian Penal Code apply, and every member of the unlawful assembly is guilty of offences committed in the prosecution of the common object of the unlawful assembly.

Section 142 of the Indian Penal Code shows that it is sufficient for the offence of riot to be proved against an individual that that individual should remain in an unlawful assembly as soon as he is aware that the assembly is unlawful. The word "continues" in the section merely means physical presence as a member of the unlawful assembly, that is, to be physically present in the crowd.

Also, under section 106 of the Evidence Act, if the defence in a case of riot is that a particular person was present among the rioters with an innocent intention, then the burden of proving that innocent intention lies upon the defence.

The functions of the High Court in an appeal by the Local Government against an acquittal by a Sessions Judge trying a case with assessors are not similar to the functions on a reference by a Sessions Judge who differs from the verdict of acquittal by a jury. In the case of such a reference, no

*Criminal Appeal No. 47 of 1933, by the Local Government, from an order of J. W. Allsop, Sessions Judge of Cawnpore, dated the 29th of September, 1932.

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doubt, the High Court has to see whether the verdict of the jury is perverse. But no such condition applies to section 418 of the Criminal Procedure Code; and what the High Court has to see is whether the offence charged is proved against each of the accused persons, having regard to the definition of "proved" given in the Evidence Act. *Queen-Empress* v. *Gayadin* (1) and *Queen-Empress* v. *Robinson* (2), overruled.

Section 162 of the Criminal Procedure Code applies both where the witness agrees with the previous statement recorded in the police diary and where he does not so agree. Where a witness is called and the statement to the police is made the subject of cross-examination, then according to this section the court should make a reference to that written statement and make a note on the record of what the written statement actually says.

The Government Advocate (Mr. *Muhammad Ismail*) and Mr. *K. Masud Hasan*, for the Crown.

Messrs. *P. L. Banerji*, *Lal Mohan Banerji* and *Sri Narain Sahai*, for the accused.

THOM and BENNET, JJ. :—This is an appeal by the Local Government against the acquittal of certain persons by the learned Sessions Judge of Cawnpore. Originally there were 41 persons prosecuted by the police on charges of riot, murder, dacoity and arson, the crimes being dated the 25th of March, 1931, and of the 41 persons prosecuted, 24 were committed to sessions, and the learned Sessions Judge acquitted all the 24 persons. The Local Government filed an appeal against the acquittal of 9 persons, and of those 9 persons, 3 persons subsequently absconded. We, therefore, have the following six persons before us as respondents: (2) Sheo Swarup, (4) Chhote, (5) Ram Narain, (7) Gobardhan, (8) Manohar Singh, (9) Puttu Singh Kayastha.

The charge is that during the Cawnpore riots of March, 1931, there was a riot with murder, dacoity and arson committed in Bangali Mahal, a mahal of

(1) (1881) I.L.R., 4 All., 148. (2) (1894) I.L.R., 16 All., 212.

Cawnpore city where the majority of the inhabitants are Hindus and there are a certain number of houses inhabited by Muhammadans.

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In the evidence for the prosecution and in the reports there are three main events. The first is the assault on the house of Fakhruddin; the second is the assault on the house of Yasin; and the third is the assault on the house of Mahbub. In each of these three cases murders were committed. * * * * Altogether, it is shown from the evidence that there were 17 persons murdered in Bangali Mahal, mostly women and children. All the houses of Muhammadans in this mahal were burnt and looted. The evidence in the case consists of statements of witnesses who saw these various incidents and sacking of some other houses, such as the house of Muhammad Azim and the house of Jan Muhammad.

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Certain points of law arose in this case. One point arises as to what the prosecution has to prove in the present case. The learned Sessions Judge states: "The question, however, is whether the offences were committed exactly in the manner described by the witnesses and whether the accused were the real culprits." Learned counsel for defence began on these lines and considered that the issues before us were whether different accused persons had taken part in different murders and assaults. We do not consider that the prosecution is called on to prove the part which each accused person took in the riot. The prosecution has to prove in the first place that there was an unlawful assembly and that the unlawful assembly committed various offences of riot, looting, arson and murder. Having proved this the prosecution has to prove that each accused person was a member of the unlawful assembly. We do not consider that the prosecution has

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to prove anything further, and no authority has been shown to us that the prosecution has to prove anything further. Having proved so much, the provisions of section 149 of the Indian Penal Code apply, and every member of the unlawful assembly is guilty of offences committed in the prosecution of the common object of the unlawful assembly. In the present case we consider that the prosecution has proved beyond any reasonable doubt whatever, and this was also held by the learned Sessions Judge, that there was an unlawful assembly on the date in question and at the place in question which committed the offences of riot, looting, murder and arson. The only question, therefore, is whether each of the accused persons was a member of that unlawful assembly. Learned counsel for defence argued that it is possible that certain accused persons were seen in the crowd and that they may have been there with innocent intentions, as the accused persons were all either residents of this mahalla or resided close to it. But section 142 of the Indian Penal Code lays down: "Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly." We consider that this section shows that it is sufficient for the offence of riot to be proved against an individual that that individual should remain in an unlawful assembly as soon as he is aware that the assembly is unlawful. Some argument was made by learned counsel that the word "continues" may have some special meaning. But we consider that it merely means physical presence as a member of the unlawful assembly, that is, to be physically present in the crowd. Learned counsel referred to a ruling in *Har Dayal Singh* v. *King-Emperor* (1). But this ruling was not on a riot at all but on a case where three persons were accused of murder, and therefore it has no application whatever. In the

(1) (1933) 10 O.W.N., 506.

present case there is no doubt that any one who was present in the crowd was at once aware that the crowd constituted an unlawful assembly and that the crowd were committing the offences of murder, arson and looting.

We may also refer to the provisions of section 106 of the Indian Evidence Act, which states: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." And illustration (*a*): "When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him." Therefore in a case of riot, if the defence is that a particular person was present among the rioters with an innocent intention, then the burden of proving that innocent intention lies upon the defence. In the present case the defence have given no evidence of any innocent intention for the presence of any accused persons and, in fact, the plea of the accused is that they were not present. The defence, therefore, is not open to the counsel for the respondents.

Another point of law which was argued was what are the functions of this Court in an appeal by the Local Government against an acquittal, and learned counsel for the respondents argued that the functions were similar to the functions on a reference by a Sessions Judge who differs from the verdict of acquittal by a jury. In the case of such a reference, no doubt, this Court has to see whether the verdict of the jury is perverse. But no such condition applies to section 418 of the Code of Criminal Procedure as amended by Act XVIII of 1923. That section provides in sub-section (1) that "An appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only." It is to be noted that the reference to a trial by jury under this section means

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a trial where the Judge has agreed with the jury in the verdict of acquittal and that the case is not similar to a reference by a Sessions Judge where he differs from the jury. This section 418 as it now stands provides for an appeal on a matter of fact where an acquittal is by a Judge trying the case with assessors. No condition is imposed on this Court in an appeal of this nature. All that this Court has to see is whether the offence charged is proved against each of the accused persons, and for this purpose this Court has to take the definition of "proved" given in the Indian Evidence Act. Reference was made by the learned counsel for the defence to certain early rulings of this Court in *Queen-Empress* v. *Gayadin* (1) and *Queen-Empress* v. *Robinson* (2). These rulings have been overruled by *Queen-Empress* v. *Prag Dat* (3) where it is stated: "Indeed it is not easy to see any distinction in the Criminal Procedure Code between the right of appeal against an acquittal and a right of appeal against a conviction." The matter is also clear from the language of section 418 of the Code of Criminal Procedure.

Another point which occurred in this case was the proper use of statements made by prosecution witnesses to the police. Under section 162 of the Code of Criminal Procedure a special procedure is laid down for the use of such statements. The learned counsel for the defence argued that that procedure only applied where it is desired to contradict the evidence of the witnesses by the statements, and that where the witness agrees with the statement section 162 did not apply. It is no doubt correct that section 145 of the Indian Evidence Act provides that in case it is desired to contradict the witness by the statement, that statement must be put to the witness, and it would follow that where the witness agreed with the statement it would not be necessary to put the statement to the witness. But it does not follow

(1) (1881) I. L. R. 4 All., 148. (2) (1894) I.L.R., 16 All., 212.
(3) (1898) I.L.R., 20 All., 459.

that section 162 does not apply where the witness agrees with the statement. We consider that the language of section 162 is meant to be comprehensive, as it definitely says: "Nor shall any such statement or any record thereof . . . . . be used for any purpose (save as hereinafter provided)." These words are perfectly general. The distinction between a statement and a record thereof is a distinction between the oral statement and the written record in the diary of that oral statement. The language of section 162 therefore covers all cases of any use of the statements to the investigating officer except as excepted by the Code of Criminal Procedure. Now section 162 provides that "The court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy." In the present case the court has merely directed that the accused be furnished with copies of statements of the prosecution witnesses and those statements have been subsequently proved by a general reference to them by the investigating officer. We consider that the court should also have complied with section 162 by making a reference to such writing. By these words we understand that where a witness is called and the statement to the police is made the subject of cross-examination, then the court should make a reference to that written statement and make a note of what the written statement actually says. It is not proper to rely on the memory of a witness as to what he thinks, many months afterwards, he stated to the investigating officer. When the writing itself is available, the court should refer to that writing and make a note on the record. The court has not done so and therefore it has been necessary for us to refer to these statements and see in each case exactly what the statement says. This may be a small matter but it saves a considerable amount of time of a court of appeal if the sessions court carries out the provisions of section 162.

We next proceed to consider the evidence against each of the accused persons.

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There is, in our opinion, a large body of evidence against each of the six respondents before us and the learned counsel for the defence has failed to show that we should reject the evidence of these witnesses as unreliable. On the contrary we consider that the minor discrepancies which have been pointed out in the evidence of the witnesses for the prosecution are discrepancies such as would naturally arise from the long interval of nearly a year and a half from the date of the occurrence to the date of their statements in the sessions court. We see no reason to reject the evidence of any of the prosecution witnesses as false. On the contrary we consider that these witnesses have in the main given a truthful account of what they saw.

Under these circumstances we convict each of the six respondents before us of the offences with which they are charged, namely, 302/307/396/436/149 of the Indian Penal Code. It is not necessary for us to pass separate sentences under each of these sections. We do not consider that the present is a case in which we should award the sentence of death because we have applied the provisions of section 149 of the Indian Penal Code, but we consider that the ends of justice will be met by sentencing each of the six respondents before us to transportation for life and we order so accordingly. The appeal will remain pending against the three absconding accused.

REVISIONAL CIVIL

1933
April, 20

Before Sir Shah Muhammad Sulaiman, Chief Justice

JANKI PRASAD (AUCTION PURCHASER) *v.* LEKHRAJ AND OTHERS (JUDGMENT-DEBTORS)*

Civil Procedure Code, order XXI, rule 89—Payment to decree-holder, out of court, of amount entered in proclamation of sale—Deposit in court of five per cent. of purchase money —Valid compliance with requirements of the rule.

Where a judgment-debtor, within thirty days of the auction sale, paid to the decree-holder out of court the sum entered in the proclamation of sale and deposited five per cent. of the purchase money in court for the auction purchaser, it was *held* that the conditions laid down in order XXI, rule 89 of the Civil Procedure Code were complied with and the sale was rightly set aside. The rule entitles the judgment-debtor to deduct the amount which has actually been received by the decree-holder since the date of the proclamation, and there is nothing to restrict the scope of the rule to payments made before the sale.

In such a case it must be found that there was actual payment to the decree-holder; a mere compromise or admission of the decree-holder would not be sufficient.

Dr. *N. C. Vaish*, for the applicant.

Mr. *P. M. L. Verma*, for the opposite parties.

SULAIMAN, C. J. :—This is an application in revision by an auction purchaser from an appellate order setting aside a sale under order XXI, rule 89 of the Code of Civil Procedure.

The property was sold on June 23, 1931, and an application under order XXI, rule 89 was filed on July 22, 1931. It contained the allegation that on that date he had paid the amount specified in the proclamation of sale to the decree-holder, and he deposited in court an amount equal to 5 per cent. of the purchase money. The learned Munsif held that a satisfaction or adjustment of the decree out of court was insufficient and accordingly

*Civil Revision No. 66 of 1933.

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JANKI PRASAD v. LEKHRAJ

dismissed the application. On appeal the learned Judge has pointed out that the ruling of their Lordships of the Privy Council in the case of *Nanhelal* v. *Umrao Singh* (1), laying down that a satisfaction or adjustment of the decree between the decree-holder and the judgment-debtor subsequent to the sale is of no effect and cannot prejudice the rights of the auction purchaser, did not apply to the facts of this case because in this case the judgment-debtor paid to the decree-holder, within thirty days from the date of the sale, the amount specified in the proclamation of sale. The learned Judge has again repeated his finding and has held that as the decree-holder received within thirty days the amount specified in the proclamation of sale the application was good.

It is quite clear that the learned Judge meant to record a definite finding that there was not merely an adjustment or compromise of the decree out of court between the decree-holder and judgment-debtor, but that there was an actual payment of the amount specified in the proclamation of sale by the judgment-debtor to the decree-holder. It may be that this finding is based merely on the admission of the decree-holder, but no objection is taken in the grounds of revision that there was no legal evidence to support the finding. I must therefore proceed on the assumption that the judgment-debtor paid the amount specified in the proclamation of sale to the decree-holder within thirty days of the sale and deposited the amount required for payment to the auction purchaser.

Order XXI, rule 89, sub-rule (1)(*b*) requires the judgment-debtor to deposit in court "for payment to the decree-holder the amount specified in the proclamation of sale . . . less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder." This rule, therefore, entitles the judgment-debtor to deduct the amount which has already been received by the decree-holder after the date of the

(1) [1931] A.L.J., 257.

proclamation. The rule does not say 'received by the decree-holder up to the date of the sale'. I am, therefore, unable to put any such restriction on the scope of the rule. Obviously, if the amount has been actually received by the decree-holder within thirty days, the judgment-debtor need not deposit the amount in court over again. The question, whether the amount has been actually received by the decree-holder, is one of fact. Obviously a mere compromise or admission of the decree-holder would not be sufficient. It would be incumbent on the judgment-debtor to satisfy the court that the amount not deposited in court had been actually received by the decree-holder within the time fixed.

The case of *Nanhelal* v. *Umrao Singh* (1), decided by their Lordships of the Privy Council, is certainly distinguishable. In that case the application for the setting aside of the sale was one under order XXI, rule 90 and not under order XXI, rule 89. It was long after the expiry of the thirty days that another application was made on the ground that there had been an adjustment between the decree-holder and judgment-debtor subsequent to the expiry of thirty days from the date of the sale. Their Lordships accordingly pointed out that such an adjustment was of no avail and could not prejudice the auction purchaser. In the present case, on the finding of the lower appellate court, the amount was actually received by the decree-holder from the judgment-debtor himself before the expiry of the period of thirty days. It seems to me that there was no defect in the application. In any case, even if the view taken by the lower appellate court were wrong in point of law it would not be possible to interfere in revision under section 115 of the Code of Civil Procedure. The lower appellate court had jurisdiction to hear the appeal and even to decide it wrongly. The application is dismissed with costs.

(1) [1931] A.L.J., 257.

Before Sir Shah Muhammad Sulaiman, Chief Justice.

1933
April, 20

MANSA RAM (PLAINTIFF) *v.* ANCHO (DEFENDANT)*

Civil Procedure Code, order VIII, rule 5—Allegation in plaint "not admitted" in the written statement—Amounts to denial—Interpretation of statutes—Punctuation marks.

Where a defendant states in the written statement that a certain allegation in the plaint is not admitted, the effect thereof, according to a correct interpretation of order VIII, rule 5 of the Civil Procedure Code, is a denial by the defendant of that allegation.

The placing of a comma after the word "implication" and before the word "or" in order VIII, rule 5 was, no doubt, unhappy, but punctuation marks cannot control the meaning of a statute. In construing a statute a court of law is bound to read it without the commas inserted in the print.

Mr. *S. B. L. Gaur*, for the applicant.

Dr. *N. P. Asthana*, for the opposite party.

SULAIMAN, C. J. :—This is a plaintiff's application in revision from a decree of the court of small causes. The plaintiff sued on the strength of two bonds, which were ostensibly executed after an interval of 14 months. The plaintiff, besides examining himself, produced one witness whose demeanour did not impress the court, and he did not produce the other witness who was a patwari. The defendant is an ignorant widow and she denied the execution of the bonds and the receipt of consideration. The execution and consideration were not admitted in the written statement, and on oath she emphatically denied them. The court below has held that in such circumstances it lay heavily on the plaintiff to prove the execution of the bonds and the advance of consideration for them and has then held: "In my opinion the plaintiff has failed to discharge the burden." I am not concerned with the reasons given by the Judge for not

*Civil Revision No. 65 of 1933.

believing the plaintiff and his witness. The finding of fact must be accepted.

* * * * *

The only other point urged on behalf of the applicant is that the plea in the written statement that the allegations contained in the plaint were not admitted was wholly insufficient under order VIII, rule 5, and that such a statement in the written statement must be deemed to be an admission of those allegations. No doubt, the placing of a comma after the word "implication" and before the word "or" in order VIII, rule 5 was unhappy, but punctuation marks cannot control the meaning of the section. In construing a statute a court of law is bound to read it without the commas inserted in the print: *Pugh* v. *Ashutosh Sen* (1), *Maharani of Burdwan* v. *Krishna Kamini Dasi* (2). I am of opinion that it could not have been intended by the legislature that where a defendant states in the written statement that a certain allegation is not admitted he shall be taken to have admitted that allegation. I think the rule should be really read as follows: "Every allegation of fact in the plaint, if not denied specifically or if not denied by necessary implication or if not stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability." If a recital in the written statement that a certain allegation is not admitted were to be deemed to be an admission, then denial by necessary implication referred to in the rule would have no meaning. I am therefore clearly of opinion that the defendant had in the written statement denied the execution and receipt of consideration when she specifically stated that she did not admit them. The application is accordingly dismissed with costs.

(1) (1928) I.L.R., 8 Pat., 516 (525). (2) (1887) I.L.R., 14 Cal., 365 (372).

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

1933
April, 20

GANESHI LAL AND OTHERS (PLAINTIFFS) *v.* ANWAR KHAN MAHBOOB CO. (DEFENDANT)*

Specific Relief Act (I of 1877), *section* 42—*Suit for a negative declaration—Declaration that defendant is not entitled to restrain plaintiff from using a particular trade mark, although plaintiff does not claim it as his property—"Right to property"—Suit brought as counterblast to criminal charge by defendant of using false trade mark—Declaratory relief discretionary.*

The defendant brought a criminal charge, under sections 482 and 486 of the Indian Penal Code, against the plaintiffs of having counterfeited and used his trade mark on *biris* (cigarettes) manufactured and sold by them. Thereupon the plaintiffs brought a suit for a declaration that they were entitled to use that particular mark and the defendant had no right to restrain them from doing so. The plaintiffs' case was that neither they, nor the defendant, nor any one else had an exclusive right to the use of that mark, and the defendant's case was that it was his exclusive trade mark. The question was whether such a suit was maintainable and whether such a relief should be granted.

Per RACHHPAL SINGH, J.—As no exclusive right of property was claimed by the plaintiffs in the particular mark, the defendant had not infringed any "property right" of the plaintiffs and the negative declaration sought by the plaintiffs should, in the exercise of the discretion of the court dealing with declaratory suits, be refused. Moreover, the result of entertaining a suit of this description, filed on the heels of the criminal charge brought against the plaintiffs, would be to render the provisions of the Indian Penal Code nugatory and prevent the owners of trade marks from seeking relief in any but a civil court, although they have a choice of two remedies open to them.

*Second Appeal No. 1169 of 1931, from a decree of S. Nawab Hasan, Subordinate Judge of Aligarh, dated the 30th of July, 1931, reversing a decree of Yudhishtra Singh Gahlaut, Munsif of Aligarh, dated the 7th of March, 1931.

Per NIAMAT-ULLAH, J.—Ordinarily there can be no objection to a plaintiff seeking a declaration which negatives the defendant's right and in so doing affirms some right claimed by the plaintiff; a cloud is removed from the plaintiff's own title when the defendant's alleged right is negatived. The position is not materially different where the right claimed by the defendant adversely affects the plaintiff's position in common with that of others similarly situated. Where the effect of negativing a right claimed by the defendant is to directly or indirectly affirm a right claimed by the plaintiff in common with others, a suit for a declaration that the defendant does not possess such right is maintainable.

Not only is the monopoly enjoyed by the proprietor of a trade mark a "right to property", but the *liberty* to use a particular trade mark is equally a "right to property".

Having regard to the circumstances that the object of the suit was to stay or to influence the decision of the criminal case, that the suit was not a representative one framed under order I, rule 8 of the Civil Procedure Code, and that the criminal case having ended in an acquittal no immediate necessity existed for the relief sought, the declaration should, in the exercise of discretion, be refused.

Mr. *P. L. Banerji*, for the appellants.

Dr. *K. N. Katju*, Messrs. *S.K. Dar*, *Mukhtar Ahmad* and *Abdul Khalik*, for the respondents.

RACHHPAL SINGH, J. :—This is a second appeal by the plaintiffs appellants arising out of a suit for a declaration to the effect that the plaintiffs are entitled to use "Chand Tara" mark on *biris* (cigarettes) manufactured by them and the defendant was not entitled to refrain them from using this trade mark. They also claimed to recover Rs.200 as damages. The suit was decreed by the first court. The defendant preferred an appeal to the court of the Subordinate Judge. He allowed the appeal and dismissed the suit of the plaintiffs. The plaintiffs have come up to this Court in second appeal.

The plaintiffs carry on the business of manufacturing *biris* at Sihora in the Jubbulpur district. They have an agency in Aligarh district for the sale of these *biris*.

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Their *biri* packets bear the trade mark of "Chand Tara", that is, crescent and star. The lower appellate court has found that the firm of the plaintiffs started their business some time in 1927 and since then they have been using the abovementioned trade mark. The defendant has also been manufacturing *biris* at Jubbulpur since at least 1919. Their packets also bear the trade mark of "Chand Tara". The learned Subordinate Judge has also found it established that there are in the market at least one dozen brands of *biris* bearing "Chand Tara" trade mark.

The defendant claimed to be exclusively entitled to use the aforesaid trade mark and lodged a complaint against the plaintiffs in the court of the City Magistrate of Lucknow under sections 482 and 486 of the Indian Penal Code for infringing their trade mark. Thereupon, the plaintiffs instituted the present suit for declaration and damages against the defendant.

The principal question for our consideration is whether the plaintiffs are entitled to the declaration claimed by them in these terms: "The court may be pleased to declare that the plaintiffs have got the right to use the trade mark and design 'A' and that the defendants have no right to restrain the plaintiffs using the same." I am of opinion that the court should not grant, in the exercise of its discretion, the declaration prayed for. Section 42 of the Specific Relief Act provides that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny his title to such character or right. Now, what do the plaintiffs ask? They ask that the court should declare that they have the right to the use of the trade mark of "Chand Tara". In the plaint there is no suggestion, and no such case has been made out, that the right to the use of the aforesaid trade mark is the "exclusive right of property" which they have acquired to the exclusion of every one else. The

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plaintiffs say that they use the trade mark of "Chand Tara" on their *biri* packets. They are entitled to use this trade mark so long as they do not infringe the rights of others. There is no necessity for them to get a declaration that they have the right to the use of any particular trade mark. In India, under the law as it stands now, every one has the right to use any kind of trade mark he likes, so long as he does not infringe the right of others already acquired. The second prayer of the plaintiffs is that it be declared that the defendants have no right to restrain them from using the above-mentioned trade mark. This implies that the defendant has no right to the trade mark which would be infringed by the plaintiffs using the same. In my opinion, a declaration of this kind should not be granted. In a Burma case in which the facts were very similar to the one before this Court, *Mohammed Abdul Kader* v. *Finlay Fleming and Co.* (1), CHARI, J., made the following observations, with which I entirely agree: "It is for the person whose trade mark is infringed to complain of the infringement. Such a person has two remedies open to him. He can file a complaint in a criminal court, or he can get an injunction from a civil court. He may choose the former remedy as being the more expeditious. Whatever his reasons may be, the choice is entirely his, and it is not for the person who is alleged to have infringed on his rights to dictate to the owner or proprietor of the trade mark what remedy he shall seek. In the case of a private prosecution in which a civil or *quasi* civil right is involved, a Magistrate, naturally and properly, is bound to stay his hands till a civil suit in which the same right is in question is adjudicated upon. The judgment of the civil court, whether binding or not, can always be tendered in evidence in the criminal case. The result of entertaining a suit of this description in which an extraordinary negative declaration is sought will be to render the provisions of the Indian Penal Code nugatory

(1) (1928) I.L.R., 6 Rang., 291 (296).

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and prevent the owners of the trade marks from seeking relief in any but a civil court. When the aggrieved party files a complaint before a Magistrate, his opponent, by the simple expedient of a declaratory suit and at the trifling expense of ten rupees, can drag him out of the criminal court to the civil court." These remarks are applicable to the case before us. In suits brought to obtain declarations under section 42 of the Specific Relief Act it is discretionary with the court to grant or refuse the relief and in every case the court will consider whether the relief should be granted having regard to the circumstances of each case. In the present case the plaintiffs ask for a sort of a negative declaration. It is not their case that they have an exclusive right to the use of the trade mark in question and that the defendants have infringed that "property right" of theirs. As no right of the plaintiffs has been infringed by the defendants, the plaintiffs should not have the declaration claimed by them. It should be distinctly understood that I express no opinion on the rights of the parties as regards the use of the trade mark in question.

The plaintiffs also claimed to recover Rs.200 as damages. In my opinion, the claim for damages was entirely misconceived. The defendants lodged a complaint against the plaintiffs under sections 482 and 486 of the Indian Penal Code for infringing their exclusive trade mark. In connection with that complaint a sub-inspector visited the plaintiffs' premises at Aligarh and seized 20 labels containing the "Chand Tara" emblem. In my opinion, this does not give any right to the plaintiffs to recover damages from the defendants. The sub-inspector simply carried out the orders of the court and it is difficult to see how any damages can be claimed from the defendants.

For the reasons given above I dismiss the appeal with costs of the defendants in all the three courts.

NIAMAT-ULLAH, J. :—I agree with the conclusions arrived at by my learned brother, namely, that the court

should not, in the exercise of its discretion, grant the declaratory relief claimed by the plaintiffs. I desire, however, to make it clear that it is in the peculiar circumstances of this case that I concur in the view that the declaratory relief should be withheld.

My learned brother has detailed the circumstances in which the plaintiffs instituted this declaratory suit. It is clear that their object was to influence the decision of the criminal case brought against them by the defendant. It is equally clear that, according to the plaintiffs, no one has any right to the use of the trade mark in question but that the defendant claims an exclusive right to use it. In other words, the defendant denies the right of the plaintiffs and every one else to use that trade mark. It is common ground that, besides the plaintiffs, there are others who are actually infringing the defendant's alleged right to use the trade mark to the exclusion of every one else. In the state of the pleadings arising from the necessities of a case framed as this one is, the plaintiffs are inviting the defendant to establish in the civil court the right which he (the defendant) claims, and after merely filing the plaint and thereby challenging the defendant's right they adopt a defensive role. Cases sometimes arise in which the plaintiff does not so much desire to establish a positive right in himself but calls upon the defendant to establish the right set up by him which, if assumed to exist, would affect the plaintiff's right. Ordinarily there can be no objection to a plaintiff seeking a declaration which negatives the defendant's right and in so doing affirms some right claimed by the plaintiff. Suits for a declaration that the defendant is not the adopted son of another whose heir, in the absence of adoption, the plaintiff admittedly is, or that the defendant is not the owner of the land of which the plaintiff is a tenant, are familiar instances of negative declarations which a court may well grant. In such cases a cloud is removed from the plaintiff's own title when the defendant's alleged right is negatived.

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The position is not, in my opinion, materially different where the right claimed by the defendant adversely affects the plaintiff's position in common with that of others similarly situated. I see no reason why, if it is otherwise maintainable, a suit for a declaration that the defendant does not possess the right which he asserts cannot lie. Where the effect of negativing a right claimed by the defendant is to directly or indirectly affirm a right claimed by the plaintiff in common with others, a suit for a declaration that the defendant does not possess such right is, in my opinion, maintainable. However the relief may be worded, the test is always the same, namely, whether the right claimed by the defendant implies a denial of the plaintiff's "right as to any property" or to some legal character.

If the defendant has the monopoly of the use of the trade mark in question, the plaintiff or any one else cannot use it for advertising his own goods by adopting the same trade mark. Indeed, in that case, using such a trade mark may amount to an offence. Where goods bearing a certain trade mark find a better market than otherwise, the right to use it is a profitable right. There can be no doubt that the monopoly enjoyed by the proprietor of a trade mark is "right to property" in view of the gain which accrues from the use of it. The *liberty* to use the same trade mark is equally a "right to property" for the same reason, namely that its use results in gain, the goods finding better market, and therefore more profit, though not to the same extent as in the case of a person having an exclusive right to use it. Cases are easily conceivable in which no one has the monopoly of using a particular trade mark, for instance, where the original proprietor has abandoned his exclusive right to use it. If, therefore, the defendant claims, falsely according to the plaintiff, an exclusive right to use a certain trade mark, to the detriment of the plaintiff in common with others, who may be inclined to use it and make some profit through it, even though it may be only

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for a short time, the plaintiff is adversely affected. Sooner or later the customers are likely to discover that the trade mark affords no guarantee as regards a particular make. A person may in good faith believe that he is at liberty to use a certain trade mark and yet does not wish to run the risk of facing a criminal trial with all the inconvenience and expense involved in it. Before embarking on any extensive use of the trade mark in question, which may entail expenditure, he may have the defendant's pretended right examined in a court of law with a view to ascertaining his own position. The court may, if the ends of justice so require, make a declaration whether the defendant has the right claimed by him, which carries with it an implication for or against the plaintiff's liberty to use the same trade mark. At the same time, the relief of declaration being in the discretion of the court, it may, in certain circumstances, refuse to grant it, even though it may be assumed that the defendant has no right. The suit may be dismissed on presentation of the plaint or after contest. It is, however, of importance to distinguish between a case which is not maintainable at all and one in which the court should not, in the exercise of its discretion, grant the relief prayed for by the plaintiff.

For the reasons discussed above, I am unable to subscribe to the broad view expressed by CHARI, J., in *Mohammed Abdul Kader* v. *Finlay Fleming and Co.* (1), that such a suit is not maintainable at all. But I am in agreement with him and with my learned brother that, in the circumstances like those of this case, the court should not grant the relief claimed by the plaintiffs.

It was alleged in the plaint that the defendant had no exclusive right to use "Chand Tara" as his trade mark, but that he claimed to have it and was prosecuting the plaintiffs for an offence under sections 482 and 486 of the Indian Penal Code. The date on which the plaintiffs'

(1) (1928) I.L.R., 6 Rang., 291.

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cause of action accrued was given in the plaint as the date on which the defendant filed his complaint in the criminal court. The object obviously was to have the criminal proceedings stayed pending the civil suit. This object was not, however, attained. The criminal case ended in conviction before the trying Magistrate but in acquittal on revision before the Chief Court of Lucknow. It is common ground that the trade mark in dispute is being used by several other persons besides the parties to this case. The defendant is claiming a right against every one else. The plaintiffs' suit is not one framed under order I, rule 8, of the Civil Procedure Code. Any judgment on the merits of the case will bind only the parties to this case, though the defendant will have to establish his right whether his adversaries are only the plaintiffs or all those interested in the controversy. The immediate necessity which led the plaintiffs to institute the suit no longer exists. It is fair to leave the defendant to choose his own time and convenience for establishing his alleged right. He should have the liberty to implead as many persons in the suit as, according to him, deny or are interested in denying his alleged right. In all these circumstances, I concur with my learned brother in holding that the declaratory relief claimed by the plaintiffs should be refused, regardless of the merits of the case.

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Young

PANNA (PLAINTIFF) *v.* RAM SARAN AND ANOTHER (DEFENDANTS)*

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April, 21

Easements Act (*V of* 1882), *sections* 28, 33, 35 *and* 43—*—Prescriptive right to light—Measure of right—Substantial interference—Easement of discharging rain water—Material increase of burden caused by change in the dominant heritage—Easement extinguished.*

Where the plaintiff established a right of easement of discharging rain water from the eaves of her kachcha house with a gabled roof so that half the water fell on the defendant's land which adjoined the house on one side, but later she changed the kachcha house into a pucca house with a flat roof discharging the entire rain water through a single spout on the defendant's land, it was *held* that there being a complete change in the character of the easement, the burden whereof had been materially increased, the easement was extinguished.

Held, also, that a plaintiff is not entitled to a mandatory injunction for demolishing the defendant's wall blocking the passage of light to one of several windows of a room in the second storey of the plaintiff's house unless the plaintiff proves that the disturbance of the right of easement of receiving light has caused substantial damage within the meaning of section 33, explanation II, of the Easements Act. Section 28 of the Act should be read together with sections 33 and 35; and any interference with the extent of the prescriptive right, as mentioned in section 28(*c*), will not give a right of action either for damages or for a mandatory injunction unless the degree of interference is such as to come within explanation II of section 33.

Mr. *V. D. Bhargava*, for the appellant.

Messrs. *S. N. Verma*, *S. K. Mukerji*, and *Prem Chana Kapilan*, for the respondents.

MUKERJI and YOUNG, JJ. :—This is a second appeal from the decision of the learned Subordinate Judge of Ghazipur.

The action was for a mandatory injunction directing the defendant to remove a wall that he had built, on the

*Second Appeal No. 399 of 1930, from a decree of Krishna Das, Subordinate Judge of Ghazipur, confirming a decree of Muhammad Zamirullin, Munsif of Ghazipur, dated the 27th of May, 1929.

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ground that it interfered with existing easements belonging to the plaintiff. There were two houses, the plaintiff's, to the north, and the defendant's, to the south. Originally the plaintiff had a kachcha house with a gabled roof, and she discharged water from her roof both to the north and to the south. For this easement, that is, an easement to discharge half her water to the south, she had acquired a prescriptive right. Some 15 years ago, however, the plaintiff changed her kachcha house into a pucca house and instead of the gabled roof she erected a flat roof on her house. In the new roof there was now only one hole which discharged all the water from the roof towards the south.

The plaintiff also claimed an easement for the light to her room on the second storey of her house. The position as regards this second storey is somewhat obscure. The learned Judge does not come to a definite decision whether an easement has been acquired for the light to this second storey or not. There is no finding whether the second storey has been built for the requisite period of twenty years or not. It is unnecessary, however, for our purpose to send the case back for a decision on this point, as it is possible to decide this question on a point of law.

Taking the second easement first, the plaintiff claims that she is entitled—assuming that she has proved the right—to the same quantity of light which she has always had in the room on the second floor. There were apparently two windows to the north, one to the east and one to the south, that is, one facing the defendant's land. The defendant has built his house right up against the house of the plaintiff so that the whole of the light of the window facing south has been obliterated. The learned Munsif finds in accordance with section 33, explanation II, of the Easements Act that there is no material interference with the physical comfort of the plaintiff and that she is not prevented from carrying on her accustomed business on the second floor by the erection of the defendant's house and the blocking up of the window. The

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learned Judge in the lower appellate court comes to the same conclusion, and upon this finding and the view taken on sections 33 and 35 of the Easements Act, dismissed the suit with regard to this easement. The appellant contends, however, that section 28(*c*) of the Easements Act gives her an absolute prescriptive right to the same quantity of light and air through the window which she has always had. If section 28 remained by itself, this view of the law would undoubtedly be right. We have, however, to read sections 28, 33 and 35 together. Section 33 clearly enacts that a suit for compensation for the disturbance of an easement only lies provided that the disturbance of an easement has actually caused substantial damage to the plaintiff. Explanation II takes this matter further and defines what is substantial damage and says that substantial damage is that damage which "interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit." Section 35 enacts that "an injunction may be granted to restrain the disturbance of an easement (*a*) if the easement is actually disturbed,—when compensation for such disturbance might be recovered under this chapter."

It is clear, therefore, in our opinion, that damages may only be recovered if there has been substantial interference as described in explanation II, and that an injunction can only be granted when compensation might be allowed under section 33, explanation II, that is, that both in the case of an action for damages or for an injunction *simpliciter*, it is necessary for the plaintiff to show conclusively that there has been substantial interference with her physical comfort, etc.

This view of the case has been supported in *Lachhmi Narain* v. *Ram Bharosey* (1) and *Gajadhar* v. *Kishori Lal* (2). The latter is a Bench decision. There is one

(1) A.I.R., 1926 All., 764. (2) (1915) 13 A.L.J., 385.

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case in *Kunni Lal* v. *Kundan Bibi* (1), where a single Judge decided the case on the view that section 28 alone was enough and that a plaintiff had an absolute right, quite apart from damage, to an injunction. In that case, however, we note that sections 33 and 35 of the Easements Act were not discussed. We may further note that the English law on this is substantially the same, and has been considered in *Colls* v. *Home and Colonial Stores* (2) and *Jolly* v. *Kine* (3) and also in *Paul* v. *Robson* (4), the last decision being a decision of the Privy Council, the English Law being applied to Calcutta.

With regard to the claim in respect of the other easement, namely, the right to discharge water, the learned Judge in the court below has come to a correct decision. The whole nature of the easement, by the alteration of the gabled roof to a pucca flat roof, has been completely changed. Formerly there was a right to sprinkle water the whole length of the eaves on one side of the house. The right to that easement was established. Now the water of the whole roof is discharged through one hole on to the defendant's land. A change of this character completely destroys the original easement, and it cannot be said that there is any prescriptive right for the new condition of affairs and that the burden has not been increased substantially. The claim, therefore, on this head must also be dismissed.

The appeal on both points having failed, is dismissed with costs.

(1) (1907) I.L.R., 29 All., 571.
(2) [1904] A.C., 179.
(3) [1907] A.C., 1.
(4) (1914) I.L.R., 42 Cal., 46.

REVISIONAL CRIMINAL

1933
April, 21

Before Mr. Justice Thom and Mr. Justice Bennet

EMPEROR *v.* ABDUL QAYUM*

Criminal Procedure Code, sections 369, 430—*High Court Rules, chapter I, rule* 1(*xvii*)(*d*)—*Revision for enhancement filed after dismissal of appeal by High Court—Revision entertainable—Jurisdiction.*

An application for the enhancement of sentence was made on behalf of the Local Government after the dismissal of a jail appeal by a single Judge of the High Court. The sentence which had been passed was illegal, as it was less than the minimum sentence directed by the Indian Penal Code to be passed for the offence committed. The question was whether, after the appellate powers had already been exercised on the jail appeal, it was open to the High Court to consider the enhancement of the sentence in revision.

Held, that in accordance with the exception provided for by section 430 of the Criminal Procedure Code the High Court could exercise the power of enhancement, notwithstanding the fact that the jail appeal had been decided, and that in exercising the power of enhancement the Court was not in any way violating the provisions of section 369 of the Criminal Procedure Code, because the provisions of section 369 must be read subject to the provisions of section 430.

Further, according to rule 1(*xvii*)(*d*), chapter I of the High Court Rules the powers of enhancement under chapter XXXII of the Criminal Procedure Code could be exercised by a Bench alone and that jurisdiction could not be exercised by the single Judge who decided the jail appeal. It was accordingly open to the Bench to exercise the powers of enhancement vested in the Court.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Mr. *K. N. Laghate*, for the opposite party.

THOM and BENNET, JJ. :—This is an application by the Local Government for the enhancement of sentences

*Criminal Revision No. 715 of 1932, by the Local Government from an order of S. M. Ali Muhammad, Additional Sessions Judge of Etawah, dated the 21st of July, 1932.

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of three years passed under sections 392 and 307 of the Indian Penal Code concurrently by the learned Sessions and Subordinate Judge of Etawah on one Abdul Qayum. It is clear in the first place that the sentence is illegal as it is contrary to the provisions of section 397 of the Indian Penal Code. That section lays down that "If, at the time of committing robbery or dacoity, the offender . . . . attempts to cause death . . . . to any person, the imprisonment with which such offender shall be punished shall not be less than seven years." In the present case it was found by the learned Sessions Judge that the accused had caught a small girl in the streets of Etawah at night and forcibly carried her to a well and took off her nose-ring of gold and her silver *jhanjhan* and her *dhoti* with a border coloured pink and he threw the small girl into a well and ran away. The girl is aged 9 or 10 years and she remained in this well all night, supporting herself in the water on a pile of bricks which had fallen into the well and also by clinging to the places where the wall of the well had broken down. In the morning people took her out of the well and she made a report that she was robbed, that she knew the appearance of the man who robbed her, that he was a Muhammadan and that he lived in a house in front of which a horse was tethered and that she could point out the house. The sub-inspector asked her to point out the house and she pointed out the house of the accused. This occurrence took place on the night of the 21st-22nd of October, 1930, and it was not till a year later, on the 3rd of October, 1931, that the accused came to give himself up. He made an attempt at an *alibi* which failed.

Certain points have arisen in this case. There was a jail appeal made by the accused to this Court and that jail appeal was dismissed by one of the members of this Bench on the 4th of August, 1932. Under the rules of this Court the seal should not be affixed until the period of sixty days for filing an appeal through counsel had passed. The seal was not affixed until that period had

expired from the order of the Sessions Judge which was dated the 21st of July, 1932. The letter to the Additional Sessions Judge stating that the appeal is dismissed is dated the 5th of October, 1932. Previous to that, on the 4th of October, 1932, the present application for enhancement was filed by the learned Government Advocate. The point which has been argued before us is that, according to the learned counsel for the accused, as the appellate powers of this Court have already been exercised on the jail appeal, therefore it is not open to this Court to consider the enhancement of the sentence on revision. No direct authority was shown for this proposition. The contrary has been held in *Emperor* v. *Jorabhai Kisabhai* (1). In that case an appeal by a convicted person to the Bombay High Court was dismissed and the conviction was confirmed and on an oral application made immediately afterwards by the Government Pleader the Appellate Bench issued a notice to the accused to show cause why his sentence should not be enhanced. An objection was taken on behalf of the accused that enhancement would amount to reviewing or revising the judgment already delivered and that at least the accused had under section 439(6) of the Code of Criminal Procedure a right to have his appeal reheard on the merits in regard to his conviction. The court held that the accused had no right to have his appeal reheard on the merits and that section 439(6) would not apply to the case and the court further held that the exercise of the powers of enhancement did not amount to reviewing or revising the judgment already delivered. Reference was made to *Emperor* v. *Kale* (2), but in that case it was merely held that this Court had no power to revise an order of this Court upholding a conviction on appeal, the application in revision being directed to the reversal of that finding and asking this Court to hold that the conviction was incorrect.

(1) (1926) I.L.R., 50 Bom., 783. (2) (1922) I.L.R., 45 All., 143.

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Learned counsel argued that section 369 of the Code of Criminal Procedure would apply to the present case and would prevent the exercise of powers of enhancement. That section provides that a court shall not alter its judgment or review the same, except for a clerical error, when the judgment has been signed. It is argued that the judgment of the learned single Judge of this Court fixed the sentence at three years' rigorous imprisonment and that the enhancement of that sentence in this Court would be a review or alteration of that judgment. We do not consider that this is correct and our reason for so considering is that section 430 of the Code of Criminal Procedure provides that "Judgments and orders passed by an appellate court upon appeal shall be final, except in the cases provided for in section 417 and chapter XXXII." Learned counsel argued that this would not cover the present case because he said that the exception would not apply to the exercise of the powers of enhancement in the present case. We consider that the exception does cover the power of enhancement. In exercising the power of enhancement we consider that we are not in any way violating the provisions of section 369, because the provisions of section 369 must be read subject to the provisions of section 430. In the present case it is also clear that chapter XXXII dealing with the powers of enhancement refers to a jurisdiction which could not have been exercised by the learned single Judge. Under the rules of this Court, chapter I, rule 1 (xvii)(*d*), a single Judge cannot exercise the jurisdiction of enhancement and that jurisdiction can only be exercised by a Bench of this Court. Accordingly, the order of the learned single Judge disposing of the jail appeal cannot be taken to have been an exercise of the jurisdiction of this Court under chapter XXXII so far as the power of enhancement is concerned. We therefore consider that it is open to this Bench to exercise the powers of enhancement vested in this Court. The law clearly provides

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in section 397 of the Indian Penal Code that the sentence passed on the accused person who has been found guilty of attempting to cause death at the time of committing robbery cannot be less than seven years.

Accordingly we accept this application in revision. We sentence the accused Abdul Qayum to seven years' rigorous imprisonment concurrently under sections 392 and 307 of the Indian Penal Code. It was urged that no charge was made under section 397 of the Indian Penal Code, but it is not necessary that that section should appear on the charge sheet, as it is not a substantive offence.

REVISIONAL CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

PARSHOTAM LAL JAITLY (DEFENDANT) *v.* HENLEY'S TELEGRAPH WORKS (PLAINTIFF)*

1933
April, 21

Civil Procedure Code, order XXX, rules 1, 6—Suit against a firm—Partner signing vakalatnama on behalf of firm—Written statement filed on behalf of firm—Sufficient to constitute appearance and contest by the partner—Civil Procedure Code, section 115—"Case decided"—Order debarring the partner from taking part in defending the suit.

In a suit brought against a firm a written statement was field on behalf of the firm by *K*, a partner, and a vakalatnama appointing advocates on behalf of the firm was signed by *J*, another partner. At a later stage of the suit *J* instructed another advocate to file an application on his behalf that *J* had not been impleaded in the suit, which was consequently defective and liable to dismissal. This application was dismissed by the court. The question was then raised whether *J* was entitled to take part in and conduct the defence of the suit, and the court passed an order that as *J* had not put in a written statement and contested the suit he could not now be entitled to take part in

*Civil Revision No. 38 of 1933.

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the defence by cross-examining the plaintiff's witnesses or producing defence witnesses. In revision from this order it was *held*—

Having regard to the provisions of rule 1(2) and rule 6 of order XXX of the Civil Procedure Code, the written statement signed and filed by one partner, *K*, should be considered to be the written statement of the firm, i.e. of all the partners constituting it, and *J* should, therefore, be considered to have contested the suit. Also, *J* had signed the vakalatnama of the advocates who appeared on behalf of the firm; and, at any rate, the authority conferred by him was effective so far as he was concerned, and *J* had, therefore, entered his appearance through counsel. Accordingly, *J* was entitled to take part in and conduct the defence of the suit.

The order debarring *J* from taking part in the conduct of the defence amounted to a "case decided" within the meaning of section 115 of the Civil Procedure Code, and in passing the order the lower court had acted illegally in the exercise of its jurisdiction, therefore a revision lay under section 115.

Dr. *N. P. Asthana*, for the applicant.

Mr. *H. L. Kapoor*, for the opposite party.

NIAMAT-ULLAH and RACHHPAL SINGH, JJ. :—This is an application for revision directed against an order passed by the learned Additional Subordinate Judge of Allahabad in a regular suit pending before him. One of the questions arising in the case is whether the order is only an interlocutory order which cannot be questioned in revision, or whether it amounts to a "case decided" within the meaning of section 115 of the Code of Civil Procedure. It is only if the aforesaid order can be considered to amount to a "decision" of a "case" that the merits of the order fall to be considered.

It appears that the plaintiff, W. T. Henley Telegraph Works, Limited, sued for recovery of a certain sum of money and impleaded the Gorakhpur Electric Supply Company, Limited, as defendant No. 1, and "P. L. Jaitly and Company" as defendant No. 2. The suit

was contested by both the defendants, who filed separate written statements. The one filed on behalf of defendant No. 2 was signed by Keshri Narain, who is one of the partners of the firm P. L. Jaitly and Company. It is not quite clear as to who are the members of the firm P. L. Jaitly and Company; but it is no longer in dispute that Keshri Narain and Pandit Parshotam Lal Jaitly are two of the partners. The words "and Company", forming part of the description of defendant No. 2, is a misnomer. It is not a company, registered or otherwise. It is only a firm, of which at least Keshri Narain and P. L. Jaitly are members. It is also necessary to mention that defendant No. 2, that is, P. L. Jaitly and Company, represented defendant No. 1, namely, Gorakhpur Electric Supply Company, Limited, as its Managing Agents. The written statements, filed on behalf of both the sets of the defendants, had, therefore, a common source, namely, P. L. Jaitly and Company. Messrs. Ladli Prasad and Radha Charan, advocates, were retained for defendant No. 1 by Parshotam Lal Jaitly, who signed a vakalatnama in their favour. Messrs. Kampta Prasad Kacker and Vidhya Dhar were retained on behalf of defendant No. 2, and a vakalatnama in their favour was executed by Parshotam Lal Jaitly. The case proceeded to trial for a considerable length of time. On the 10th of January, 1933, Mr. Ramnama Prasad, acting under instructions from Parshotam Lal Jaitly, presented an application that the latter had not been impleaded in the suit, which was consequently defective and liable to dismissal. It was prayed that the suit be dismissed on that ground. The learned Judge dismissed this application for certain reasons, which it is not necessary to mention. That order became final and has not been questioned in revision before us. Immediately after that order was passed, Mr. Ramnama Prasad, again professing to act on behalf of Parshotam Lal Jaitly, presented an application, which referred to the court's recent order of the 10th of January, 1933, and prayed

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"that this court be pleased to decide whether the petitioner can as a proprietor of defendant No. 2 go on with the case or not." This application was disposed of by an order of the same date, which is in question in revision before us.

The application dated the 11th of January, 1933, asked for the decision of a question which, so far as the proceedings preceding that application show, had never arisen. The order of the court, however, shows that Parshotam Lal Jaitly's misgivings regarding his right to take part in the conduct of the suit were not altogether unfounded. The learned Judge passed an order which negatives that right. The material portion of that order is as follows: "You had a right to put in a written statement or contest, if you desire and at the proper time. If you want now to go on with the suit, you must ask to be allowed to defend or put in a contest and contest the suit, but you cannot be allowed to come in at any moment and say as you also are a member or the proprietor you can be allowed to cross-examine the plaintiff's witnesses or produce evidence on your own behalf without having actually filed any contest or made appearance when you might or ought to have done so. So I cannot allow you now to cross-examine plaintiff's witnesses or to produce evidence on your own behalf." It seems to us that there was some confusion of thought in the minds of counsel appearing before the lower court on the 11th of January, 1933, and of the lower court itself. The position of a firm is materially different from that of a registered company when it sues or is sued. Order XXX of the Code of Civil Procedure makes it perfectly clear how far a firm, as distinguished from a registered company, can be represented by its individual partners. We confine our remarks to cases in which a firm is sued, and refrain from taking any notice of those provisions of order XXX which relate to cases in which a firm is plaintiff. It will appear from rule 6 that "Where persons are sued as partners in the name of their firm,

they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm." It is clear that the defendant firm can put in its appearance in the manner provided by rule 6, that is, its individual members should put in appearance but the description of the defendant must continue to be as before, that is, the name of the firm. Where some only of a large number of partners put in appearance, the fact will be duly recorded; and if appearance has not been put in by all the partners, the case will be one in which some only of the partners have appeared and others have not. The suit being one in which the entire firm is sued, the liability of each partner is not several but a collective liability, unless any particular partner is impleaded for some reason in his individual capacity, in which case he should figure as a party wholly apart from his capacity as a partner. Each of the partners who has entered appearance as such has precisely the same rights as regards the conduct of the case as one of several defendants having a common defence. The name of the firm is only a compendious description of the partners in reference to the common interest which they possess in a certain concern. When the firm is arrayed as a defendant, all the partners should be deemed to be in the array of the defendants in their capacity as partners.

Order XXX, rule 1(2) of the Code of Civil Procedure provides that "Where persons sue or are sued as partners in the name of their firm, it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons." In this case the written statement signed by one of the partners, namely Keshri Narain, was filed. It should be considered to be the written statement of the firm, that is, of all the partners constituting it. Parshotam Lal Jaitly should, therefore, be considered to

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have contested the suit. Messrs. Kampta Prasad Kacker and Vidhya Dhar, whose vakalatnama was signed by Parshotam Lal Jaitly, appeared on behalf of defendant No. 2. We do not consider it necessary to decide whether Parshotam Lal Jaitly had the authority to empower the aforesaid advocates to appear for all the partners. At any rate, the authority conferred by him was effective so far as he was concerned. Similarly, Mr. Ramnama Prasad, whose vakalatnama was signed by Parshotam Lal Jaitly, could legally represent him in the proceedings. The court never ordered the proceedings to be *ex parte* against the firm or any member thereof. It is thus clear that Parshotam Lal Jaitly, who is admittedly a member of the firm "P. L. Jaitly and Company", entered appearance through his authorised counsel up to the date on which the order in question in this revision was passed. We think that the premises on which the learned Subordinate Judge based his conclusion are not well founded. Parshotam Lal Jaitly did contest the suit, and the learned Subordinate Judge's assumption to the contrary is not correct. That he put in appearance as one of the partners of the firm is also undeniable. As a defendant in the case he was as much entitled to cross-examine the plaintiff's witnesses and to produce evidence for defence as any other defendant. It is not necessary, for the purposes of this case, to decide whether the firm as a whole will be bound by what he does in conducting the case. It is, however, unquestionable that, in conducting the case, he is bound by the written statement filed on behalf of the firm, and his conduct of the suit should not travel beyond it.

For the reasons discussed above, we are of opinion that the order passed by the lower court was not in accordance with law.

The next question is whether the order is one which can be interfered with in revision. We are of opinion

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that the lower court's decision that the defendant is not entitled to take part in the conduct of the case amounts to a "case decided" within the meaning of section 115 of the Code of Civil Procedure. In depriving Parshotam Lal Jaitly of his right to cross-examine the plaintiff's witnesses and to examine witnesses in defence the lower court acted illegally in the exercise of its jurisdiction.

The result is that this application is allowed. The order of the lower court is set aside and it is declared that Parshotam Lal Jaitly, as one of the partners of the firm P. L. Jaitly and Company, is entitled to cross-examine the plaintiff's witnesses and to examine such witnesses on his behalf as he may be advised, provided there is no other circumstance in the case which disentitles him to these privileges.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji, and Mr. Justice King

RAM ADHAR AND ANOTHER (PLAINTIFFS) *v.* SUDESRA (DEFENDANT)*

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April, 25

Hindu Law of Inheritance (Amendment) Act (II of 1929), section 2—"Sister" does not include a half-sister.

The word "sister" in section 2 of the Hindu Law of Inheritance (Amendment) Act, 1929, does not include a half-sister, either consanguine or uterine.

Messrs. *Ram Nama Prasad* and *Kanhaiya Lal*, for the appellants.

Mr. *Shiva Prasad Sinha*, for the respondent.

*Second Appeal No. 1517 of 1931, from a decree of Mathura Prasad, Additional Subordinate Judge of Benares, dated the 31st of August, 1931, confirming a decree of Harish Chandra Sinha, Additional Munsif of Benares, dated the 7th of May, 1931.

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RAM ADHAR v. SUDESRA

SULAIMAN, C. J., MUKERJI and KING, JJ.:—This is a reference to a Full Bench. The questions to be decided are:

(1) Does the word "sister" in section 2 of the Hindu Law of Inheritance (Amendment) Act (Act II of 1929) include a half-sister?

(2) If so, does it include both a half-sister by the same father and a half-sister by the same mother?

These are abstract questions of law, and we therefore need not go into the facts of the case.

The word "sister" in the English language ordinarily means a sister of the full blood. For authority see Murray's English Dictionary, edition of 1919. It says: "A female in relationship to another person or persons having the same parents." Then it notes in smaller types: "Sometimes loosely used in the sense of half-sister, and in that of sister-in-law." In the Concise Oxford Dictionary "sister" is stated to mean "daughter of same parents (also sister-german) or (strictly half-sister) parent". This means that a sister must be the child of the same parents, but sometimes a half-sister is also called a sister. Chambers's Dictionary also gives the same meaning to the word sister. Thus, in plain English language a sister would not include a half-sister.

In the Indian Succession Act (Act XXXIX of 1925), section 27 lays down that for purposes of succession under that Act there is no distinction between those who are related to a person by the full blood and those who are related to him by the half blood. But this section 27 does not apply to Hindus; see section 23 of the same Act. The fact that it was necessary to mention that there was no distinction for purposes of the Indian Succession Act of 1925 between a person of the half blood and a person of the full blood goes to

show that, but for this enactment, there would be a distinction.

This is by way of a general observation based on the language of the Act.

If we look into the spirit of the Hindu law as interpreted in those parts of the country where the Mitakshara law prevails, we shall find that a relation of the full blood excludes a relation of the half blood. If we hold that "sister" in section 2 of Act II of 1929 includes a half-sister, we shall be putting a sister and a half-sister in the same category. Further, we shall be introducing a "half-sister" between the words "sister" and "sister's son". Further, Act II of 1929 is an enabling Act which introduces certain persons as heirs who had no such place according to the ordinary interpretation of the Mitakshara law. Unless we have a clear reason to believe that the legislature was introducing, by implication, a person not specifically mentioned as an heir, we have no right to give the word "sister" a wider meaning than it would ordinarily bear.

Again, if we hold that a sister includes a half-sister, then there will be no reason to make a distinction between a uterine sister and a consanguine sister. Among the Hindus a woman on becoming a widow does not remarry, except under the enabling Act of 1856, and instances of such marriages are very rare. Ordinarily it would be repugnant to the notions of Hindus to recognize a woman as a sister who has not the same father as the person himself. She would, therefore, not be regarded as an heir.

For the reasons given above, we think that the Act should be construed strictly, and we hold that the word "sister" does not include a half-sister, either uterine or consanguine.

The second question does not arise in view of our answer.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

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MUHAMMAD ABDUL JALIL KHAN AND ANOTHER (DEFENDANTS) *v.* MUHAMMAD ABDUS SALAM KHAN (PLAINTIFF)*

Co-owners—Joint property in exclusive possession of some co-owners—Ouster—Suit by others for compensation for use and occupation—Whether maintainable without partition—Suit for share of profits of part only of joint property—Whether maintainable.

A co-owner who is ousted and excluded from the enjoyment of his share in the property held by him and others as tenants-in-common is entitled to maintain a suit for compensation for use and occupation of his share from which he has been excluded by other co-owners. Also, one co-owner can sue another for his share of the profits which the latter has realised from some of the items of the joint property, and his only remedy is not a suit for partition. So *held* in a suit by one of three Muhammadan brothers, who jointly owned five houses besides other property, for compensation for use and occupation of two houses from which the plaintiff had been ousted and for his share of the rents realised by the defendants from the three other houses. The case, however, of co-sharers holding various parcels in joint zamindari, held by them as tenants-in-common, for the sake of convenience would stand on a different footing.

Where different co-sharers have, without force or fraud, been in peaceful and exclusive possession of different portions of joint properties for a time sufficient to raise the inference that their separate possessions originated in some mutual understanding, that arrangement cannot be disturbed either by a suit for joint possession or one for compensation for use and occupation; in such a case the only remedy left would be a suit for partition.

Dr. *K. N. Katju* and Mr. *N. A. Sherwani*, for the appellants.

Messrs. *A. M. Khwaja* and *C. B. Agarwal*, for the respondent.

*First Appeal No. 457 of 1929, from a decree of Syed Nawab Hasan, Additional Subordinate Judge of Aligarh, dated the 30th of May, 1929.

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MUHAMMAD ABDUL JALIL KHAN v. MUHAMMAD ABDUS SALAM KHAN

SULAIMAN, C. J., and RACHHPAL SINGH, J. :—This is a defendants' appeal arising out of a suit instituted by the plaintiff which has been partially decreed by the court below.

The plaintiff respondent and the defendants appellants are three brothers; they are joint owners of the five properties, situate in Aligarh, detailed in the plaint. Each of the three brothers owned one-third share in them. Property No. 1 is a pucca residential house, while properties Nos. 2 to 5 are kachha buildings known as *ahatas*.

The plaintiff, in his plaint, stated that during the period of three years from 1st of June, 1925, to 31st of May, 1928, the plaint property had been in use and occupation of the defendants, that properties Nos. 1 and 2 could be let at about Rs.300 per mensem, and that therefore he was entitled to recover from the defendants a sum of Rs.100 monthly as compensation for the use and occupation of his one-third share of these two properties. As regards properties Nos. 3 to 5 the plaintiff alleged that the defendants had been letting them out and had realised rents therefor, and he, therefore, claimed to recover his one-third share in the same.

The defendants contended that the plaintiff was not entitled to get compensation in respect of properties Nos. 1 and 2. The properties Nos. 3 to 5 had been in wretched and ruinous condition and had been mostly unoccupied, that though some portions thereof had been let on rent on some occasions yet the income had been hardly sufficient to meet the cost of repairs. It was also pleaded that the parties owned several properties jointly, and therefore a suit in respect of profits of some of them only was not maintainable.

The plaintiff had claimed a sum of Rs.5,047-14-0. The learned Subordinate Judge has made a decree for Rs.2,913-8-0. The defendants have preferred this appeal.

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Before proceeding any further we may point out here that the learned counsel for the appellants, on the authority of the ruling in *Swan Tee* v. *Ma Ngwe* (1), contended before us that one co-sharer could not sue another for use and occupation of property held by them as tenants-in-common. We find that the two learned Judges of the Burma Chief Court in the above mentioned case held that "a suit for use and occupation by a co-owner against another co-owner will not lie." We find ourselves unable to agree with this view when so broadly stated. We see no valid ground for holding that a co-owner cannot sue another co-owner for use and occupation when the former has been ousted and has been excluded from the enjoyment of his share in the property held by them as tenants-in-common. It is the right of each and every co-owner to enjoy the property in common with other co-owners and as soon as that right is denied or a co-owner is prevented from enjoying the property like other co-owners, he has a cause of action for recovering compensation for use and occupation of his share from which he was excluded. Another ruling cited by the learned counsel for the appellants is *Jagar Nath Singh* v. *Jai Nath Singh* (2). The learned counsel for the appellants relies on the following observation in the judgment of STANLEY, C. J., at page 90: "It appears to me that if co-sharers desire to sue a co-sharer who is in occupation of joint property and who has not obtained possession illegally, the only course open to them is to apply for and obtain partition." It was argued by the learned counsel for the appellants that so long as there is no partition, a co-owner cannot sue another for the use and occupation of the joint property. In our opinion, the rule cited above lays down no such proposition, because after the above quoted sentence we find the following: "It is true that the co-sharer in possession must account to the other co-sharers for the profits of

(1) (1916) 32 Indian Cases, 630. (2) (1904) I. L. R., 27 All., 88.

the land of which he is in exclusive physical possession." So long as the partition does not take place, we think the co-sharer in exclusive possession is liable to account for profits to the other co-sharers. The facts of the case in the above quoted ruling of the Allahabad High Court were different. There, on the death of a tenant of a land which was the property of four persons jointly, one of the co-sharers took possession of the tenant's holding and commenced to cultivate it himself. The remaining co-sharers sued to recover physical possession. The court held that the only relief which the plaintiffs could get was a declaration that they were joint owners and entitled to ask the co-sharer in possession to account for profits. The Court found that it was not a case in which one co-sharer has taken "illegally" the possession of some land to the exclusion of the other. In the case before us, however, the facts are different. If the plaintiff could establish that he was prevented from the use of his one-third share by the defendants, then his ouster would be an "illegal" act on the part of the defendants which would entitle him to claim compensation. Another case on which reliance was placed on behalf of the appellant is *Basanta Kumari Dasya* v. *Mohesh Chandra Shaha* (1). That case, in our opinion, does not help the appellants. It was held that "Sole occupation of different parcels of land by different co-sharers according to their convenience does not constitute ouster of the others and that 'ouster' must mean dispossession of one co-sharer by another where a hostile title is set up by the latter, and where the occupation of the latter is not consistent with joint ownership." It is clear that this ruling would not apply to a case where a co-sharer could show that he has been ousted from the enjoyment of a house by another co-sharer. In such a case the occupation of a co-sharer in possession would not be "consistent with joint ownership". After a consideration of the

(1) (1913) 21 Indian Cases, 621.

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rulings cited above by the learned counsel for the appellants we are of opinion that the contention that a co-owner cannot sue another co-owner for compensation for use and occupation of property held by them as tenants-in-common even if he is excluded from the enjoyment of his share is not correct and cannot be accepted. We hold that a co-sharer who is ousted and excluded from the enjoyment of his share in the property held by him and others as tenants-in-common is entitled to maintain a suit for use and occupation of his share from which he has been excluded by other co-sharers. Nor do we agree with the argument that one co-sharer cannot sue another for his share of the profits in the property which one of them might have realised and that his only remedy is to sue for a partition. If two co-sharers own a house and one of them realise its entire rent, there does not seem to be any reason as to why the one realising the entire rent should not be compelled to pay the share of the other. We would like to add, however, that the case of co-sharers holding various parcels in joint zamindari held by them as tenants-in-common for the sake of convenience would stand on a different footing.

Where different co-sharers have without force or fraud been in peaceful and exclusive possession of different portions of joint properties for a time sufficient to raise the inference that their separate possessions originated in some mutual understanding, that arrangement cannot be disturbed either by a suit for joint possession or one for compensation for use and occupation. In such a case the only remedy left would be a suit for partition.

It is a common ground between the parties that properties Nos. 1 and 2 have never been let on rent.

The first question which we have to determine is whether the plaintiff can claim any compensation from the defendants in respect of properties Nos. 1 and 2. The plaintiff, in paragraph 2 of the plaint, states that

"owing to partnership, the parties are in legal possession of the said property, which is however in use and occupation of the defendants." The plaint is not happily worded, but its perusal goes to show that the plaintiff claimed compensation for use and occupation of the properties Nos. 1 and 2 because he had been excluded from the enjoyment of his own share in them. The plaintiff went into the witness-box and stated on oath that he asked the defendant No. 1 to let him live in property No. 1 but the defendant No. 1 did not accede to this request and said that he would not allow the plaintiff to put up in the kothi because there was litigation going on between them. * * * * * In our opinion the plaintiff has made out a case of ouster and, therefore, he is entitled to compensation in respect of properties Nos. 1 and 2.

About properties Nos. 3 to 5 the plaintiff in paragraph 4 of his plaint stated: "As regards properties Nos. 3, 4 and 5, the defendants are responsible to pay the rent for the last three years, to the extent of one-third share as profits of his share. As far as the plaintiff has learnt from enquiry defendant No. 1 has received the entire amount." * * * * Now, it will be clear from the pleadings that the question for consideration was what amount the defendants had realised as rent of properties Nos. 3 to 5. The learned Subordinate Judge has brushed aside this question and has held the defendants liable for the rents which they might have realised, because they did not look after the buildings properly. It is enough to say that no such case was set up by the plaintiff in the plaint and so the court below was altogether wrong in holding the defendants liable simply on the ground that they did not keep the properties in good repair. It was as much the duty of the plaintiff as that of the defendants to keep the premises in good repair. A suit for the recovery of the plaintiff's share in the rents realised has been converted by the learned Subordinate Judge into a suit to recover damages

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because the buildings were not kept in good repair. The question for our consideration is whether the evidence produced in the case goes to show what rents properties Nos. 3 to 5 fetched during the three years in suit. [After referring to the evidence the judgment proceeded.] Under these circumstances we are justified in accepting the statement of the plaintiff that the properties Nos. 3 to 5 must have fetched at least Rs.54 monthly.

In respect of properties Nos. 1 and 2 the learned Subordinate Judge has fixed the rent at the rate of Rs.150 monthly for the purpose of determining the amount which the plaintiff should get as his one-third share. About properties Nos. 3 to 5, we are of opinion that the plaintiff's statement that they could fetch at least Rs.54 monthly should be accepted. With reference to these rates the amount which the plaintiff should get on account of his one-third share comes to Rs.2,457. The learned Subordinate Judge has allowed the plaintiff interest on the amount due at the rate of Rs.12 per cent. per annum. We do not, however, think that any interest should be awarded to the plaintiff. To this extent the appeal must succeed.

The appellants urged that as they and the plaintiff owned several properties as tenants-in-common, so the latter could not institute a suit to recover rents or compensation in respect of only some of them. We can see no force in this plea. The plaintiff was ousted in respect of two of them and he had a right to recover compensation in respect of those properties. As regards properties Nos. 3 to 5 the defendants' own evidence shows that they alone realised rents and there can be no doubt that the plaintiff could ask them to give his share in the rent realised. It was, of course, open to the defendants to show by their evidence that the entire income of properties Nos. 3 to 5 had gone towards the

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repairs of other buildings owned by them as tenants-in-common and so nothing was due. But the defendants never attempted to prove a case of this kind.

For the reasons given above, we allow the appeal in part, modify the decree of the court below by dismissing the plaintiff's claim for interest claimed by him. The decree in favour of the plaintiff for a sum of Rs.2,457 stands. He will get future interest on the amount at Rs.6 per cent. per annum from the date of the suit till satisfaction. The parties will receive and pay costs in both the courts in proportion to their success and failure.

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Young

MANGAT RAI AND OTHERS (PLAINTIFFS) *v.* DULI CHAND AND OTHERS (DEFENDANTS)*

1933 APRIL, 25

Election—Choice of two remedies which are not co-existent but alternative—Adoption of one bars the other—Estoppel—Decree-holder accepting payment of decree money is barred from pressing appeal against order which had set aside the sale—Civil Procedure Code, section 11, *explanation IV—Constructive* res judicata *arising out of execution proceedings—Transfer of Property Act (IV of* 1882), *section* 52—*—Affected by doctrine of election.*

Mortgaged property was sold in execution of a decree for sale and was purchased by the mortgagee decree-holder. On an application by the judgment-debtor the sale was set aside, and two days later he sold the property by private sale. The decree-holder filed an appeal against the order setting aside the sale; to that appeal the vendee was not a party. A few days later the vendee deposited in the execution court money for discharging the decretal amount. Before the appeal came up for hearing, the decree-holder withdrew the money from the execution court, but he did not mention this fact at the

*First Appeal No. 67 of 1930, from a decree of Muhammad Aqib Nomani, Additional Subordinate Judge of Meerut, dated the 14th of December 1929.

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hearing of the appeal, which was in due course heard and allowed. The decree-holder then claimed the property as his, and the vendee brought a suit against him for declaration of the vendee's title.

Held that the doctrine of election applied to the case. Where a litigant has a right to choose between two remedies which are not co-existent but alternative, and adopts one of those remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute. When the decretal amount was deposited in court the decree-holder had two alternative remedies; he could either take the money or prosecute his appeal. He definitely adopted the first and was thereby absolutely estopped and barred from prosecuting his appeal. He acted dishonestly in prosecuting his appeal after having taken the money, and he obtained a decision of the appeal in his favour by keeping the appellate court ignorant of the fact of his having withdrawn the money.

Qudrat-un-nissa Bibi v. *Abdul Rashid* (1), distinguished.

Held, also, that the fact that the point about the doctrine of election was not raised in the execution appeal did not operate as constructive *res judicata* under explanation IV of section 11 of the Civil Procedure Code. An implied decision in execution proceedings cannot be a bar to the trial of a question which arises in a subsequent suit. Further, as the question arising in the execution appeal had to be decided on the facts relating to the sale, and the withdrawal of the money was a new fact arising long after the sale, it could not be said that this point was one which might and ought to have been raised in that appeal.

Held, further, that by the application of the doctrine of election the decree-holder was estopped from relying on section 52 of the Transfer of Property Act.

Sir *Tej Bahadur Sapru* and Mr. *M. N. Raina*, for the appellants.

Dr. *K. N. Katju* and Mr. *P. L. Banerji*, Dr. *N. C. Vaish* and Mr. *Ambika Prasad*, for the respondents.

MUKERJI and YOUNG, JJ. :—This is a first appeal from the judgment of the Additional Subordinate Judge of Meerut. The plaintiffs brought a suit for a declaration that they were the owners of certain property and

(1) (1926) I. L. R., 48 All., 616.

that the defendants had no right to it. The lower court dismissed the suit. The plaintiffs appeal. The admitted facts are as follows. One B. Duli Chand, a vakil, together with his two infant sons were the mortgagees of the land in suit. On the 12th of March, 1927, B. Duli Chand obtained a decree for sale of the mortgaged property for the sum of Rs.5,000. The property in due course was put to auction and was purchased by B. Duli Chand for Rs.1,300. On the 5th of September, 1927, the sale was set aside at the instance of the judgment-debtor by the Subordinate Judge. On the 7th of the same month the judgment-debtor sold this property together with other property to the plaintiffs for the sum of Rs.13,000. On the 1st of November, 1927, B. Duli Chand filed an appeal in the High Court against the order setting aside the sale. In that appeal the plaintiffs were not parties. On the 4th of November, 1927, the plaintiffs, who had meanwhile purchased the property from the judgment-debtor, deposited in court Rs.5,529 for the discharge of the debt due to B. Duli Chand. The execution case was thereupon struck off as satisfied. On the 1st of March, 1928, B. Duli Chand and his two sons applied to the court to withdraw the deposit paid in by the plaintiffs and on the 21st of May the money was withdrawn. On the 6th of February, 1929, the appeal to the High Court against setting aside the sale was heard and decided in favour of B. Duli Chand. It is to be noted that when this appeal was heard by the High Court the Bench which heard it, of which one of us was a member, was not informed by the appellants of the deposit of the amount due to the appellants in court or that the said sum had been taken out in satisfaction. B. Duli Chand, after his success in the High Court, claimed the property as his, and this suit was thereupon filed by the plaintiffs.

It is argued by Sir *Tej Bahadur Sapru* on behalf of the appellants that the defendants are now estopped

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from denying the plaintiffs' proprietary rights in respect of the property in suit; that when they took their money out of court they must be held to have abandoned their other remedy of appeal against the order setting aside the sale and that their election in that matter is now binding upon them and they cannot fall back upon their other remedy. It is urged by Sir *Tej Bahadur Sapru* that the present plaintiffs were not represented in the appeal to the High Court; that the judgment-debtor, who was represented, having sold his property to the plaintiffs had thereafter no real interest in defending the appeal, and that if the High Court had been informed that the appellants before it then had taken the money out of court, the appeal would undoubtedly have been dismissed. He further says that it was the duty of the appellants in that case to lay all the facts before the Court and that they failed in that duty.

Dr. *Katju*, who appears for the respondents, on the other hand relies on section 52 of the Transfer of Property Act. He contends that the plaintiffs when they bought the property took it subject to the law of *lis pendens* and that they are bound by the decision of the court below. He further argues that section 11 of the Code of Civil Procedure applies, that the point now relied upon—that the appellants in that case took the money out of court—ought to have been pleaded in the case, and that therefore the matter is *res judicata*. He contends that the doctrine of election does not apply, and relies upon a decision of a Bench of this Court in *Qudrat-un-nissa Bibi* v. *Abdul Rashid* (1). This was a pre-emption case and it was there held that where the pre-emptor in execution of his decree paid the purchase price of the property into court and the vendee took it out, the vendee was not estopped from prosecuting his appeal against the decision of the lower court.

(1) (1926) I. L. R., 48 All., 616.

We are satisfied that the respondents in this case having taken out of court the money due to them on account of the property did not act honestly in prosecuting thereafter their appeal against the order setting aside the sale, and we are further satisfied that if the High Court, which decided the appeal in favour of the present respondents, had known the facts which it was the duty of the appellants to place before the Court, the appeal would not have been allowed. We must, however, decide this appeal according to law.

We are not satisfied that the pre-emption case relied upon by the counsel for the respondents is an authority on the point before us. It is to be noted that when a successful pre-emptor pays money into court, he becomes entitled to take possession of the property at once. That being so, it would be unreasonable to suggest that the vendee, having been threatened with a loss of his property, was not entitled to take the money out of court and obtain upon it interest, which he otherwise would not obtain, until the appeal was heard. We do not think that, properly considered, taking out the money in the case of a pre-emption decree is an election within the meaning of the decisions upon that doctrine. We think, therefore, that the authority quoted above can be distinguished. We have, therefore, not had to consider whether we agree or not with the Bench of this Court which decided the pre-emption case alluded to above. The main difficulty which the appellants had to overcome was section 11 of the Code of Civil Procedure, which enacts that "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, . . ." and, further, explanation IV, which is that "Any matter which might and ought to have been made ground of defence or attack in such

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former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

We have come to the conclusion that the respondents have failed to establish that section 11 applies in this case. The proceedings which ended in the appeal to the High Court were not a "suit". They were proceedings in execution only. An implied decision in that case cannot be a bar to the trial of a question which arises in a subsequent suit: See *Ram Charan Sahu* v. *Salik Ram Sahu* (1). No doubt the principle of *res judicata* has been extended to proceedings in execution. We, therefore, have to decide whether the appellants, as successors in title of the respondents in the former execution first appeal, are precluded from arguing the question of election on the ground that this is a point which "might and ought to have been made ground of defence or attack in the former proceedings." The only question before the court of appeal in the former proceedings was whether the sale of the property was a valid sale or not. That question was to be decided on the facts which arose on or before the day of the sale. The taking out of the money by the appellants took place months after the appeal was filed. The present plaintiffs or their predecessors in title (the respondents to the former appeal) could not have argued this point without producing additional evidence in the High Court. The Court might have refused to admit additional evidence. The predecessors in title of the appellants were entitled to argue that appeal on the points then before the Court. We cannot say that they either "might or ought" to have raised the present point in the former proceedings. We, therefore, hold that explanation IV does not apply, and that section 11 cannot help the respondents in this present appeal.

Section 52 of the Transfer of Property Act would help the decree-holder in the former litigation and would be

(1) (1929) I. L. R., 52 All., 217.

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for his benefit. But if the contention of the present appellants is correct in law that the decree-holder when he took the money out of court in the execution case came to a final and conclusive election, he would be estopped from relying upon section 52. When the present plaintiffs paid the money into court in the execution proceedings B. Duli Chand had two alternatives. He could either take the money out of court or prosecute his appeal. He definitely decided to adopt his right of taking the money out of court. He thereby represented to the present plaintiffs and to all the world that he had abandoned his appeal. The doctrine of election undoubtedly, in our opinion, applies. The alternatives before B. Duli Chand were not co-existent, but alternative, and once having adopted one of his remedies, he cannot now be allowed to rely upon another. The doctrine of election has been applied in England in many cases. The leading case is that of *Scarf* v. *Jardine* (1), where it was held that where a customer might at his option have sued a late partner of a firm or the members of a new firm, and had elected to sue the new firm, he could not afterwards sue the late partner. In *Ferguson* v. *Wilson* (2) it was held that where the plaintiff could receive payment for a loan to a company either in shares or in money, and where his conduct led to the inference that he had accepted a cheque in payment, he was debarred from any claim to the shares. Further, in *Bedford and Cambridge Railway* v. *Stanley* (3) where the promoters of a railway company could either sue upon an agreement with landholders along the course of their proposed line for the purchase of their land, or might acquire the land compulsorily under the Land Clauses Act, 1845, Chapter XVIII, section 85, and had commenced proceedings under their compulsory powers, it was held that they were therefore precluded from enforcing their rights under the agreement. The question of election has also been considered in India. In

(1) (1882) 7 A. C., 345. (2) (1866) 2 Ch. A., 77.
(3) (1862) 70 E. R., 1260.

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Beni Madhub Das v. *Jotindra Mohun Tagore* (1) a Bench of the Calcutta High Court held that where a court had returned a plaint for presentation to the proper court and the plaintiff had taken back his plaint and presented it to the proper court, it was not open to him to appeal from the order returning the plaint. The learned Chief Justice of the Calcutta High Court said: "The plaintiff having availed himself of the benefit of the order and having elected to present his plaint to the Burdwan Court, I do not see how he can now appeal from the order . . . He seems to have exercised the option that was given to him either to avail himself of the order or to appeal against it, and he elected to proceed under the order and avail himself of it." In *Baikuntha Nath Dey* v. *Nawab Salimulla Bahadur* (2) the Calcutta High Court held that where a litigant has a right to choose between two remedies which are not co-existent but alternative, and adopts one of those remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute. Mr. JUSTICE MOOKERJEE said: "There can be no doubt that when a litigant has the right to choose between two remedies which are not co-existent but alternative, he may select and adopt one as better adapted than the other to work out his purpose; but once he has made his choice, and adopted one of the alternative remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute."

We have no doubt that the two remedies before B. Duli Chand were not co-existent but alternative; that he deliberately selected one, and that his act undoubtedly operated as a bar to his further appeal to the High Court. This point, as we have held above, is open to the present appellants, as it could not be said that their predecessors in title might and ought to have raised this point in the former appeal. The question whether the respondents would have the money or the property arose definitely

(1) (1907) 11 C. W. N., 765. (2) (1907) 12 C. W. N., 590.

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when the appeal in the execution case was decided. As the result of that appeal, the respondents had both the money and the property. They could not keep both. Hence they offered to return the money. In the suit out of which the appeal has arisen the question we have to decide is whether the respondents should have the property or the money. This is, therefore, a proper stage to raise the question. We have held that the respondents having decided to take the money cannot keep the property.

We accordingly allow the appeal, set aside the decree of the court below and decree the appellants' claim with costs throughout.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Thom

ANIS BEGAM AND OTHERS (DEFENDANTS) *v.* MUHAMMAD ISTAFA WALI KHAN (PLAINTIFF)*

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Muhammadan law—Restitution of conjugal rights—Prompt dower remaining unpaid after cohabitation—Suit for restitution not defeated thereby—Conditional decree—Power to impose condition of payment or other equitable or necessary conditions—Legal cruelty of husband—Discretion of court—Interpretation of Muhammadan law—Injunction claimed against wife's relations—Burden of proof.

The absolute right of a Muhammadan wife to insist on the payment of the whole of the prompt portion of her dower before restitution of conjugal rights (except when the husband wants to take her out on a journey to another town) is lost after the consummation of the marriage, unless the consummation took place when she was a minor or of insane mind so as to be incapable of giving consent.

Although the observation of MAHMOOD, J., in the case of *Abdul Kadir* v. *Salima* (1) was an *obiter dictum*, founded upon

*First Appeal No. 234 of 1931, from a decree of Raj Rajeshwar Sahai, Subordinate Judge of Bareilly, dated the 7th of March, 1931.

(1) (1886) I. L. R., 8 All., 149.

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a too closely applied analogy of sale of goods and upon a misconceived rule of interpretation of the Muhammadan law, and although texts and commentaries of ancient jurists of recognized authority could be cited in support of the opposite view, yet it would be dangerous now to go back upon the long course of decisions which throughout India, excluding Oudh, have accepted and followed that dictum, and thereby to unsettle the law by not adhering to the well recognized principle of *stare decisis*.

There is no absolute right in a husband to claim restitution of conjugal rights against his wife unconditionally; the courts have a discretion to make the decree conditional on the payment of her unpaid dower debt or to impose other suitable conditions considered just, fair and necessary in the circumstances of each case.

Under the Anglo-Muhammadan law as administered in this country a suit for the restitution of conjugal rights, though brought for the enforcement of a right under the Muhammadan law, is in the nature of a suit for specific performance, and there is accordingly a certain amount of discretion in the courts of justice which can impose a condition of previous payment of the dower debt or of a portion of it, in the decree.

In the particular circumstances of the present case a condition for previous payment of the dower debt was imposed, having regard to the considerations that the amount of the dower was not excessive or beyond the means of the plaintiff, that the defendant had obtained a decree for dower in spite of contest and the defendant, if compelled to go to live in the plaintiff's house, might find it very difficult to realise her decree which would thus become futile, that the plaintiff's suit was apparently by way of nullifying that decree, and that the plaintiff had been guilty of legal cruelty to the defendant.

Where it was established that the husband had been keeping a mistress in the same house with his wife and that, when quarrels ensued on that account, he treated his wife cruelly, the court, in a suit for restitution of conjugal rights, imposed the conditions that, unless the husband gave an undertaking not to keep any mistress in the house, a separate house should be provided for the wife, and two servants, of her choice, for her personal safety should further be provided for her.

Where an injunction is claimed against the wife's relations, to whose house the wife had gone for protection and safety, the

onus is on the plaintiff to prove that they are actually inducing the wife against going to her husband or preventing her from doing so; the mere fact that they gave shelter and protection to her cannot justify a decree for injunction against them.

It is not a general rule of interpreting the Muhammadan law that whenever there is a difference of opinion between Imam Abu Hanifa and his two disciples the opinion of a majority out of the three will prevail, or that the opinion of Imam Abu Hanifa will prevail over that of the disciples; there is no fixed rule of universal application in such cases. If one finds a question well threshed out and in later centuries a particular interpretation adopted by the leading doctors and text-book writers, it would not be proper now to go behind such a consensus of opinion and decide a point contrary to such opinion, on the ground that the majority of the three Imams favoured that view in the earlier centuries. Rules of preference were for the guidance of ancient jurists, and they are of no help when there is a clear preponderance of authority in support of one view. But if in any case the later jurists have not adopted in clear language any one of the conflicting opinions, but have merely stated the conflicting opinions without expressing any preference for either, then it is implied that the conflict of opinion was still continuing without any general concurrence having been attained, and it would then be open to choose whichever of the opinions appears to be the sounder and better adapted to the conditions and the needs of the times.

Mr. *G. S. Pathak*, for the appellants.

Messrs. *S. Muhammad Husain, Mukhtar Ahmad, A. M. Khwaja* and *Masud Hasan*, for the respondent.

SULAIMAN, C. J.:—This is a defendants' appeal arising out of a suit for restitution of conjugal rights. The plaintiff alleged that the parties were married in 1923 and the defendant No. 1 was sent to the plaintiff's house in October, 1926, and began to live with him as his wife and gave birth to a daughter; but that about two years ago the other defendants took her away from the plaintiff's house to their own house for a week under the pretext of attending a ceremony; that, when after the expiry of the week, the plaintiff went to bring his

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wife, the defendants made excuses and ultimately refused to send her, although they sent the plaintiff's daughter to the plaintiff's house. He accordingly prayed that the defendant should be ordered to come to the plaintiff's house and that a perpetual injunction should be granted against the other defendants from interfering with the defendant No. 1's returning to the plaintiff's house.

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The defendant No. 1 in her written statement asserted that the plaintiff became immoral and contracted illicit connection with one Mst. Hibia who was kept in the same house and at her instigation the plaintiff began to ill-treat the defendant and ultimately turned her out of his house. She did not admit the paragraph containing the allegation that the daughter was sent to the plaintiff's house afterwards. She pleaded that when the plaintiff neglected her and did not pay her dower debt, she was obliged to file a suit to recover Rs.15,000 as her prompt dower and that the plaintiff's suit was filed by way of reply to her suit. She pleaded that so long as the plaintiff does not pay the prompt dower due to the defendant, he is not competent to maintain the suit, and she also urged that the suit should be dismissed on the ground of the plaintiff's cruel acts in ill-treating her and in contracting illicit connection with Mst. Hibia, and that the defendant's refusal to go to his house is through fear of life and honour. She admitted that she was staying away from the plaintiff's house at her own instance and no other defendant is exercising any influence over her. The other defendants denied that they were in any way preventing the defendant from going to the plaintiff's house.

The learned Subordinate Judge framed four issues: (1) Whether the plaintiff had been guilty of cruelty towards the defendant? (2) Whether any prompt dower was due to the defendant, and if so, can the plaintiff get a decree without paying it? (3) Whether the plaintiff has any cause of action against the other defendants?

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(4) To what relief was the plaintiff entitled and against whom? He decided all the issues in favour of the plaintiff and against the defendants and decreed the claim. All the defendants have accordingly appealed.

It may be here stated that the suit for dower brought by the defendant against the plaintiff succeeded in the court below and the defendant, in spite of contest, obtained a decree for Rs.15,000, which decree has become final. Thus neither the amount of the dower debt due to the defendant nor the fact that it has not been paid is now in question.

The learned Subordinate Judge, relying very properly on certain reported rulings of this Court, has held that after the consummation of her marriage the defendant's right to resist the claim for restitution of conjugal rights was destroyed. Finding that legal cruelty was not established, he has decreed the suit. He does not appear to have considered whether apart from legal cruelty there are any circumstances justifying the passing of a decree conditional on the payment of the dower debt.

I propose to consider first of all the question whether under the Muhammadan law the right of a wife to insist on the payment of the prompt portion of her dower subsists even after consummation of marriage.

The leading case of this Court is undoubtedly that of *Abdul Kadir* v. *Salima* (1). The judgment of MAHMOOD, J., was adopted by the Full Bench. It has since been regarded as a detailed survey of the Muhammadan law with particular reference to the points noted on page 154, viz., (1) the exact nature and effect of marriage upon the contracting parties; (2) the exact nature of the liability of the husband to pay the dower; (3) the matrimonial rights of the parties as to conjugal cohabitation; and (4) the rules of general law as to the decree of the court in such cases. But the only point that had been referred to the Full Bench for an answer was "Whether under

(1) (1886) I. L. R., 8 All., 149.

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the circumstances of the case the plaintiff had the right *to maintain* the suit." In that case the dower debt had not been paid before the suit for restitution of conjugal rights, though the marriage had been consummated, but the amount was tendered in the trial court. That court held that the plaintiff was entitled to succeed in his claim for bringing his wife to his house. On appeal, the District Judge accepted the defendant's contention that the payment into court after the institution of the suit was insufficient because the husband had no cause of action when he brought the suit, and it was on this ground that he dismissed the suit *in toto*. The main point which was for consideration before the Full Bench was, therefore, whether the non-payment of the dower before the institution of the suit was fatal to the suit because without such payment there was no cause of action for suing for restitution of conjugal rights. The opinion of the court was that it is not correct to say that there was no cause of action and that non-payment of the dower before the suit was not a fatal defect. That opinion is binding upon us. I am not aware that this view has ever been questioned in any other court.

But although we are bound to respect the expression of opinion on the other points mentioned in the judgment of that learned Judge, some of the observations made by him are obviously in the nature of *obiter dicta* which he had to make when surveying the whole law. It is, therefore, not possible for one to hold oneself bound by all the observations that have been made or all the opinions expressed in connection with all the four fields of inquiry enumerated by the learned Judge at the outset. Nor would it be convenient to refer to a Full Bench of five or more Judges whenever any observation made therein is called into question. Much less would such a course be necessary if the observation of the learned Judge is followed, though the reasoning on which it is based is not accepted.

Now at page 166 it was observed: "I take it as a general rule of interpreting that law, that whenever there is a difference of opinion, the opinion of the two" (out of the three Masters, namely, Imam Abu Hanifa and his two disciples) "will prevail against the opinion of the third." A similar observation was made by the same learned Judge in *Agha Ali Khan* v. *Altaf Hasan Khan* (1). I do not think that the learned Judge meant to lay down any inflexible rule which would have universal application. Presumably, what he meant was that ordinarily the opinion of the majority has been accepted. But it would be easy to cite instances in which the opinion of Imam Abu Hanifa alone has prevailed, particularly in matters of prayer and ritual, or of Imam Yusuf in matters of worldly affairs, or of Imam Muhammad in matters of inheritance. There appears to be no such invariable rule which would make the decision depend on the majority of votes only.

Mr. Ameer Ali in his Mahommedan Law, volume II, 5th edition, chapter XII, section III, page 460 has pointed out that there is no such fixed rule, as over and over again the opinion of only one has been adopted for *fatwas* and decrees. In volume I, at pages 16-17, he has quoted Hamadia, Jam'aa-ul Fusalain and Kazi Khan for the proposition that the joint opinion of the two disciples can be preferred to that of Imam Abu Hanifa if the difference is due to a change of circumstances and alterations in the conditions of mankind.

The learned advocate for the appellants has adopted as part of his argument a well known judgment of 1891 delivered by Maulvi Sami Ullah, District Judge of Rae Bareli, in which original authorities were quoted to challenge the opinion of MAHMOOD, J., both as regards this rule of preference and also the distinction of the right of the wife whose prompt dower remains unpaid to resist restitution of conjugal rights even after consummation. This judgment has been referred to by

(1) (1892) I. L. R., 14 All., 429 (448).

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Mr. Ameer Ali as well as Sir Roland Wilson in their learned treatises. These authorities were subsequently incorporated in the judgment of an Oudh Bench in *Wajid Ali Khan* v. *Sakhawat Ali Khan* (1). On pages 144-7 of the report in that case some of the texts have been reproduced to show that, even in the case of a difference, the opinion of Imam Abu Hanifa is to be preferred. Of course, there is no such general rule either. As a matter of fact, there does not appear to be any fixed rule: See *Irfan Ali* v. *Bhagwant Kishore* (2). Different doctors have followed different rules of preference. Those who were more orthodox and, generally speaking, more ancient, in many cases preferred the solitary opinion of Abu Hanifa to even the joint opinion of his disciples. There are later text-book writers who have preferred the opinion of two as against that of one. But such rules are helpful only when there is no clear consensus. In the early days when new points arose and the decision had to depend on an inference drawn from other *fatwas* or from analogy, it was open to the learned doctors to prefer one opinion over the other which they considered more correct and consonant with the other principles, inasmuch as the three Imams were not law-givers but merely interpreters of the law. But if one finds a question well threshed out and in later centuries a particular interpretation adopted by the leading doctors and text-book writers, it would not be proper for us in the twentieth century to go behind such a consensus of opinion and decide a point contrary to such opinion, on the ground that the majority of the three Imams favoured that view in the earlier centuries. Such a course of action would unsettle the Muhammadan law. Rules of preference were for the guidance of ancient jurists, and they are of no help when there is a clear preponderance of authority in support of one view. It would be too late now to resort to such rules in support of a new conception as to how

(1) (1912) 15 Oudh Cases, 127. (2) A. I. R. 1929 All., 180 (187).

a point ought to have been decided, though contrary to accepted opinion. Maulvi Abdul Hai of Lucknow, the most renowned and learned Hanafi jurist of his time, has in his Introduction to Sharah Wiqayah dealt with this matter at considerable length. A good deal of that matter is to be found in Radd-ul-Muhtar summarized in Sir Abdur Rahim's Muhammadan Jurisprudence at pages 187-8, which can be conveniently referred to. He has rightly pointed out that there is no accepted rule that when there is a difference of opinion amongst the founders of schools and their disciples, opinion or ruling of a lawyer ought to be given according to the opinion of Abu Hanifa, even if all his disciples differ from him; and in the absence of any dictum of his in accordance with the opinion of Abu Yusuf, then Muhammad, then Zufar and then Hasan Ibn Ziyad. If the authorities were examined it will generally be found that in some matters the solitary view of Abu Hanifa has been preferred whereas in other matters the view of Abu Yusuf, Muhammad or Zufar has been followed. According to Al-Hawi the correct rule was that in cases of difference of opinion regard should be had to the authority and reasons in support of each view and the one which has the strongest support should be followed. "But according to the modern interpretation of *Taqlid* as above stated a lawyer of the present day should, in such cases, accept the view which according to the jurists of the fourth, fifth, and sixth degrees is correct and has been acted upon. But if in any case the later doctors have not adopted in clear language any one of the conflicting opinions, the law is to be ascertained by proceeding on the view which is most in accord with the habits and affairs of men." (p. 188).

The Radd-ul-Muhtar, volume I, page 73, states that if on any matter no clear answer from any one of the early jurists were to exist, and the later doctors have one opinion, then that should be adopted; but if they

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differ, then the view of the majority of those on whom well known doctors like Abu Hafs, Abu Jafar, Abul Lais, Tahawi and others have relied should be accepted. And if a clear answer were not to exist from any one of these later jurists, then the Mufti should consider the question carefully and try his best to arrive at a correct conclusion so that he may be relieved of the charge of not having considered it fully.

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شامي جلد اول صفحه ٧٣

و إن الم يوجد في الحادثة عن واحد منهم جواب ظاهر و تكلم فيه المشائخ المتاخرون قولاً واحداً يوخذ به فان اختلفوا يوخذ بقول الاكثرين ثم الاكثرين مما اعتمد عليه الكبارا لمعروفون منهم كابي حفص و ابي جعفر و ابي الليث و الطحاوي وغيرهم ممن يعتمد عليه و ان لم يوجد منهم جواب البتة نصاً ينظر المفتي فيها نظر تامل و تدبرو اجتهاد ليجد فيهما مايقرب الى الخروج من العهدة ولا يتكلم فيها جزافاً *

It would follow that if jurists of the first rank have differed among themselves but the jurists of the second, third and fourth ranks have followed the opinion of one of them, it would not be proper in later times to go behind the opinion of these later jurists and prefer the opinion of the majority of the jurists of the first rank which has been discarded by those of subsequent periods.

The proper course undoubtedly is to abide by the opinions which have been adhered to in the commentaries which are of recognized authority in India and not to decide the point on any general rule of interpretation based on the majority of votes of the ancient jurists.

Their Lordships of the Privy Council in the case of *Aga Mahomed Jaffer Bindanim* v. *Koolsom Beebee* (1), remarked: "But it would be wrong for the courts on a point of this kind" (the right of the widow to inherit) "to attempt to put their own construction on the Quran in opposition to the express ruling of commentators of such great antiquity and high authority" (as the Hedaya and the Fatawa Alamgiri). It is the practice of the great

(1) (1897) I. L. R., 25 Cal., 9(18).

commentators to state the difference of opinion which at one time prevailed on a particular point and then to add on which view is the *fatwa*, or which is the more correct or stronger view, or to use other expressions of like import. But where the learned commentators content themselves with a mere statement of the conflict of opinion without expressing any definite opinion of their own in favour of one or the other view and without saying anything about the consensus of opinion or the *fatwa* being in accordance with a particular view, they imply that the conflict of opinion was still continuing and that no unanimity or general concurrence had till then been obtained. This would have the effect of leaving the question open. The Qazi would then be free to choose whichever of the two opinions appears to him to be the sounder and better adapted to the conditions and the needs of the times.

The Radd-ul-Muhtar, volume I, page 80, when reproducing the text of the Durr-ul-Mukhtar has quoted from Quduri as follows : "And if you said that they (jurists) have sometimes quoted several opinions without giving preference and have differed as to their correctness : Then I would say that we should act as they, having regard to the change in the habits and conditions of men, did what was more convenient, practicable and better. And people who can discriminate are not extinct. This is a fact and not an imagination. But those who cannot discriminate should refer to those who can, so that they will be free from responsibility."

الدر المختار من تصحيح القدوري – شامي جلد اول صفحه ٨٠

فان قلت قد يحكون اقوالاً بلا ترجيح وقد يختلفون في الصحيح – قلت يعمل بمثل ماعملوا من اعتبار تغير العرف و احوال الناس و ما هو الارفق و ما ظهر عليه التعامل و ما قوي وجهه ولا يخلوالوجود عمن يميز هذا حقيقة لاظناً و على من لم يميزان يرجع لمن يميز لبراءة ذمة

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Now before MAHMOOD, J., in the case of *Abdul Kadir* v. *Salima* (1), no texts other than those of Durr-ul-Mukhtar, Fatawa Alamgiri (and possibly Hedaya) which all state the conflict of opinion, without saying which view should be preferred, were cited. The learned Judge accordingly felt compelled to make a deduction from certain principles governing sale of goods, and applying them to the contract of marriage observed, at page 167 of the judgment in *Abdul Kadir's* case, "after consummation of marriage, non-payment of dower, even though exigible, cannot be pleaded in defence of an action for restitution of conjugal rights; the rule so laid down having, of course, no effect upon the right of the wife to claim her dower in a separate action".

If the observation was intended to mean that the plea of non-payment of dower would not result in the dismissal of the suit, it has never been questioned. If it was intended to lay down that under the Muhammadan law the right to demand payment of dower before restitution of conjugal rights is destroyed completely after the marriage has once been consummated, then it was an *obiter dictum* in that case and though it must be treated with all respect it may not be of binding authority. That it was an *obiter dictum* is apparent from the very next sentence which is to the effect: "But the rule enunciated by me need not be applied in its fullest extent to the present case, because, etc." The line of reasoning based on the analogy of sale has naturally been very severely criticised at pages 148-9 in *Wajid Ali Khan's* case (2) by the Oudh Bench, and so also by Mr. Ameer Ali in his Mahommedan Law, volume II, pages 459-60. No doubt the Muslim commentators have, by way of illustration, applied certain principles governing a contract of sale of goods to the contract of marriage, but that was by way of analogy only. The similarity cannot be pushed too far, nor can the principles governing the sale of goods be

(1) (1886) I.L.R., 8 All., 149. (2) (1912) 15 Oudh Cases, 127.

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applied in all their details. Indeed, if one were to pursue the analogy far enough there would be a *reductio ad absurdum*. The contract of sale of goods can be cancelled if a portion of the price has not been paid. Even if the goods have been once delivered they may in such an event be returned. But if consummation of marriage has taken place and a part of the dower remains unpaid, it would be absurd to suppose that the marriage could be cancelled by the wife at her will. Similarly, I do not think that the learned Judge, when he referred to the right of stoppage *in transitu* at page 166, at all intended to apply that rule to the restitution of conjugal rights. Such a right is exercised when the goods are in the possession of a carrier or agent and are in the course of transit, when the original owner of the goods has only a constructive and not actual possession. That doctrine can, by no stretch of the imagination, be applied to the refusal of the wife to go to her husband, as there can be no question of transit or carrier at all.

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It is quite obvious that the analogy of sales cannot be carried too far. The marriage cannot be regarded as purely a sale of the person by the wife in consideration for the payment of dower and even if such a grotesque analogy were to be carried to its fullest extent, it would not necessarily result in support of the observation made in *Abdul Kadir's* case. The answer will depend on whether the dower is the consideration for the first consummation of marriage only or whether it is the consideration for the society of the wife during the married life. The mere fact that the whole dower becomes due after consummation is no conclusive ground for holding that the dower is consideration only for the first consummation. The lien on goods sold may be lost when possession is lost, but that lien is revived when possession is again recovered. Again, if part of the goods have been delivered and part of it is still retained, the lien on the part retained continues. It may therefore be well

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argued that if the wife after the consummation returns to her own house she can still resist restitution of conjugal rights so long as her dower is not paid, because her right has been revived after the cohabitation ceased. It may also be pointed out that a prompt dower does not become payable unless a demand is made. Prompt dower is dower payable on demand. It follows that no demand might have been made, and in most cases it is not made before the consummation of marriage. The consent of the wife before her dower became due should logically not destroy her right to recover her dower after it has become due, though previous to it consummation had taken place. She should have the right to insist upon its payment before further cohabitation. I have not mentioned these points in order to base any conclusion on the analogy of sales, but merely to emphasise that the analogy cannot be carried too far, and even if carried very far, it does not necessarily clinch the matter. It may not be out of place to mention here that Maulvi Samiullah collected some authorities showing that a marriage is not regarded as a mere civil contract, but as a religious sacrament.

The original authorities on the main question before us may be grouped under three heads. For the sake of brevity I am not quoting the original texts or their translations if they have already appeared in the reported judgment of *Wajid Ali Khan* v *Sakhawat Ali Khan* (1).

Under the *first* head come some of the ancient text-books called *Matan*. These are very terse and concise and generally state the opinion of Imam Abu Hanifa on this point without even mentioning the difference of opinion between him and his two disciples and consequently without saying which opinion is to be preferred. These are (1) The Bedaya, (2) The Tanvirul Absar, (3) The Kanz-ud-Dakaik and (4) The Waqayatar-Rewaya. These are all quoted in *Wajid Ali Khan's* case. No doubt in the early days there was a recognized rule that the texts

(1) (1912) 15 Oudh Cases, 127.

should be preferred to commentaries and that commentaries should be preferred to collections of *fatawas*; but when centuries passed, the consensus of opinion of jurists and doctors was often found to be contrary to some of the ancient texts. Accordingly the commentaries which stated both the opinions and then preferred one over the other on the strength either of reason or *ijma* gained greater strength. So much so that in later centuries the ancient text-books or *matan* came to be regarded as elementary treatises in which the law is only concisely and tersely laid down and the statement of the law contained therein required further explanation. The Kanz-ud-Dakaik (though of much later date) is particularly a book of this description, as it is extremely concise. This matter is discussed at length in Radd-ul-Muhtar, a reference to which is also found in Sir Abdur Rahim's Muhammadan Jurisprudence on pages 189-190. The author of Radd-ul-Muhtar goes so far as to suggest that even the Durr-ul-Mukhtar on which he was writing his commentary should not be readily accepted on account of its brevity.

Under the *second* group may be put the great commentaries which discuss the law, state the difference of opinion and do not clearly indicate a preference for one view and so in a way leave the point open.

(1) The Hedaya, which is the commentary on the Bedaya by the same author, first quotes the text of the Bedaya and then notes the difference of opinion between the Imam and his disciples, but omits to say which of the two should be preferred. (Hamilton's Translation, volume I, book II, chapter III, page 52).

(2) The Durr-ul-Mukhtar which is the commentary on the Tanvir-ul-Absar quotes the text of Tanvir-ul-Absar and comments on it, giving some reasons. It does not in express terms state its own opinion as to what is to happen if consummation has taken place, but by implication it adopts the text, particularly as it does not even

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mention the difference of opinion between the Imam and the disciples. In *Wajid Ali Khan's* case (1) the text of Tanvir-ul-Absar has been correctly quoted, but there has been a little confusion in quoting the text of the Durr-ul-Mukhtar. What has been quoted includes again the words of the text of Tanvir-ul-Absar interspersed with the comments of the author of the Durr-ul-Mukhtar. The author merely attempts to explain the obscure words. He does not purport to discuss them.

(3) The Bahr-ur-Raik which is an elaborate commentary on the Kanz-ud-Dakaik (volume 3, at page 191, Egyptian edition) quotes the difference of opinion, but does not clearly express the view that the opinion of the disciple is to be preferred. But on page 192 it quotes Bazdavi, who attained the position of a *mujtahid* of the third rank (Sir Abdur Rahim's Muhammadan Jurisprudence, page 183), to the effect that Abul Qasim Saffar gave *fatwa* against the right of the wife to resist restitution after consummation and says that Bazdavi considered that opinion to be good.

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و اما اذ اوطئها أوخلا بها برضاها ففيه خلاف قال ابوحنيفه رحمه‌الله ان تمنع نفسها و خالفاه لان المعقود عليه كلى صار مسلماً اليه بالو طاة الواحدة و بالخلوة و لهذا تياكدبها جميع المهر فلم يبق لها حق الحبس كا لبائع اذا سلم المبيع

بحرالرائق صفحه ۱۹۲

و فى شرح الجامع الصغير للبزدوى – كان ابوالقاسم الصفار يفتى فى المنع بقول ابى يوسف و محمد و فى السفر بقول ابى حنيفه ثم قال و هذا حسن فى الفتيا يعنى بعد الدخول لا تمنع نفسها ولو منعت لانفقة لها كماهو مذهبهما –

(4) The Shara Wiqaya, which is a commentary on the Waqayatar-Rewaya, quotes the text on which it comments, and then just mentions the difference of opinion, but omits to express any preference of its own.

(1) (1912) 15 Oudh Cases, 127.

(5) The author of Fath-ul-Qadir, which in its turn is a great commentary on the Hedaya, also states the difference of opinion, but omits to give his own opinion as to which view should be preferred. Although it is an exhaustive commentary, it deals with this point rather briefly, and does not even refer to Saffar or Bazdavi.

(6) Tahtawi, a great commentary on the Durr-ul-Mukhtar, also quotes the difference of opinion and refers to the *fatwa* of Saffar, and says that Bazdavi considered it better, but does not express its own preference (Book on Marriage, chapter on Dower, page 99, Calcutta edition).

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طحطاوی صفحہ ۹۹

وکان الصغار یفتی فی المنع بقولهما و فی السفر بقوله قال البزدوی وهذا احسن فی الفتیا یعنے بعد الدخول لاتمنع نفسها ولو منعت لا نفقة لها کما هو قولهما ـ

(7) The author of the Radd-ul-Muhtar (more commonly known after its author Shami), another and more exhaustive commentary on the Durr-ul-Mukhtar, curiously enough deals with the matter briefly, gives the difference of opinion between the Imam and the disciples, without mentioning Saffar or Bazdavi. He does not state his own conclusion as to which of the two opinions should be preferred.

(8) Under this category I may also mention the following *fatawas* in particular: (i) Fatawa Kazi Khan. It quotes the difference of opinion, but omits to express any preference (15 Oudh Cases, at page 134); (ii) Fatawa Alamgiri. Baillie's Muhammadan Law, volume I, page 125 gives a correct translation of the relevant passage in the *fatawa* except perhaps the last sentence in which the original word "Ba'z" has been translated as 'several', though it would be more correct to say 'some'; but here, too, after quoting the practice of Shaik-us-Saffar, the compilers omit to add on which view the *fatawa* should be given.

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Other ancient text-books like Qaduri do not refer to the difference of opinion at all.

In the *third* group may be placed some books which prefer the opinion of the disciples. I am not quoting them as books of overriding authority but merely to point out that the *fatawas* have not been all one way.

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(1) Fatawa Ghiyasia (chapter on marriage, page 65, line 19, Egyptian edition) says: "If a wife were to submit her person without obtaining her dower and then wish to refuse to cohabit with him until she recover her dower when he has cohabited with her, then in this there is a well known difference. But the opinion to be adopted is that she has not this right, but she can demand from her husband the prompt dower."

فتاوی غیاثیه

و فی الفتاوی اذا سلّمت المراة نفسها بدون قبض المهر ثم ارادت ان تمنع نفسها حتی تقبض مهرها و قد دخل الزوج بها فالخلاف فیه معروف والمختار انه لیس لها ذالک ولکن لها ان تطالب الزوج بالمهر المعجّل

(2) The Jami-ul-Rumuz which is a commentary on Mukhtasar-ul-Waqayah by Sadrus-Sharaya, says (volume II, page 211, Nawal Kishore edition): "And Abul Qasim-us-Saffar gave *fatawa* on the absence of the right to refuse cohabitation, and according to his (Imam's) opinion on the right to refuse to go out on journey, and on this is the *fatawa* as is mentioned in the Haqaiq." It is possible to urge that the language of the text is capable of the interpretation that "this" refers only to the refusal to go out on journey.

جامع الرموز - و ابو القاسم الصفار افتی به فی عدم المنع من الوطی و بقوله فی المنع من السفر و به یفتی کما فی الحقائق

(3) Fatawa Himadya quotes Umdatul Fatawa which does not refer to the case of consummation. Similarly, the quotation from Fatawa Mufti has no reference to consummation (*see* 15 Oudh Cases, page 135). The learned

Judges of Oudh thought that Himadya quotes a passage from Tahzib which states that "although she has once cohabited willingly with her husband, she has a right of refusal contrary to the view of the Sahabain". But the learned Judges seem to have overlooked that the passage goes on to refer to the opinion of Qasim Saffar and then the opinion of the author of Tahzib is stated in the following terms: "The approved view according to me is that the wife possesses the right of refusal if there has been ill-treatment on the part of the husband, and if it be the fault of the wife, then she has no such right."

حمادیّة من التهذیب – المختار عندی فی المنع ان کان سوء المعاشرة من الزوج لها المنع و ان کان من جهتها فلیس لها المنع

It would, therefore, follow that the Tahzib is against there being any absolute right of refusal in the wife. On the other hand, she is given that right only when the husband has been ill-treating her. This might be a very commonsense view to take, but there does not appear to be any further support for it. But in any case Tahzib cannot be cited as an authority in favour of the wife's right. If anything, it is an authority against such right.

(4) In this connection I ought to mention Fatawa Maulana Abdul Hai, who was undoubtedly the most learned Hanafi doctor in India in his time. His *fatawas* cannot be put on a par with the recognized commentaries or *fatawas*. I propose to cite his *fatawa* in order to show the trend of opinion that has prevailed in this country. His *fatawas* are even now freely referred to and relied upon by Maulvis when easy access to the original authorities in Arabic is not to be had.

Fatawa No. 197 (1296 A.H. corresponding to 1878) volume I, page 240, is particularly important. It may be briefly summarised as follows:

A Sunni woman, Hinda, was married to a Shia husband, Zaid, and the marriage was performed according to the Shia form. After having cohabited and lived with

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her husband for some days, Hinda returned to her mother's house with her husband's permission and then remained there demanding her prompt dower. Zaid feared that she might become immoral. The question put to the Maulana was whether Zaid could, according to his religion, bring her to his house without payment of prompt dower in accordance with the opinion expressed in the Shia text-book, Sharay-ul-Islam, although according to the Hedaya there appeared to be some difference of opinion. The answer was that the husband can take away the wife without payment of her dower debt, and for authority Bahr-ur-Raiq was cited which quotes the opinion of Bazdavi who referred to the *fatwa* of Abul Qasim Saffar.

It thus appears that the older text-books no doubt preferred the opinion of Abu Hanifa as against those of his disciples, so much so that they did not even care to mention the difference of opinion; but the later commentators pointed out that the disciples had differed from the opinion and also noticed that jurists like Bazdavi and Saffar had not followed Abu Hanifa strictly; but these commentators omitted to express their own definite opinion as to which view should be preferred. On the other hand there are, at any rate, some authorities which definitely preferred the opinion of the disciples to that of Imam Abu Hanifa. It is obvious that though in the earlier centuries the view of Abu Hanifa was generally accepted, the divergence from it became more pronounced in later times. Even down to the time of Aurangzeb in India, when the Fatawa Alamgiri was compiled, the conflict of opinion continued and no definite consensus of opinion seems to have been reached, otherwise it was most probable that the approved opinion would have been mentioned.

This being the state of the authorities, the question is whether the *obiter dictum* of MAHMOOD, J., which has been accepted by so many other High Courts, is to be followed.

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Had I been sitting as a Judge in the times of the East India Company, I might then possibly have been inclined to prefer the opinion of Imam Abu Hanifa, because although a conflict ensued afterwards no eminent commentator expressly dissented from that view. But if another Judge had been prepared to take the contrary view, I would not have been in a position to say that he was necessarily wrong. The two considerations which might well justify the acceptance of the view of the disciples in India are: First, that owing to the prevalent practice, the amounts of dower fixed in this country are often unduly high and beyond the means of the husband. To allow to the wife the right of refusing to live with her husband, even after consummation, so long as any part of the prompt dower remains unpaid would, in many cases, where the husband and wife quarrel, amount to an absolute option to the wife to refuse to live with her husband and yet demand a maintenance allowance. This would dislocate domestic life. Secondly, as will be shown hereinafter, under the Anglo-Muhammadan law as administered in this country a suit for restitution of conjugal rights, though brought for the enforcement of a right under the Muhammadan law, is in the nature of a suit for specific performance, and there is accordingly a certain amount of discretion in the courts of justice which can impose a condition of previous payment of the dower debt, or, at any rate, a portion of it, in the decree.

And now the position is still stronger. For nearly 40 years the observation of MAHMOOD, J., even though an *obiter dictum*, has been accepted in this Court, and indeed it has been followed by all the other High Courts excepting Oudh: *Kunhi* v. *Moidin* (1); *Hamidunnessa Bibi* v. *Zohiruddin Sheikh* (2); *Bai Hansa* v. *Abdulla Mustafa* (3); *Ashia Khatoon* v. *Abdul Hakim Maistry* (4) and *Mst. Saleh Bibi* v. *Rafi-uddin* (5).

(1) (1888) I. L. R., 11 Mad., 327. (2) (1890) I. L. R., 17 Cal., 670.
(3) (1905) I. L. R., 30 Bom., 122. (4) A. I. R., 1929 Rang., 189.
(5) [1889] Punj. Rec., No. 164.

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In the case of *Abdul Karim Khan* v. *Mst. Chhoti* (1) a learned Judge of this Court followed an earlier decision in the case of *Wilayat Husain* v. *Allah Rakhi* (2), which had been overruled by the Full Bench. But apparently the attention of the learned Judge was not drawn to the observation in the Full Bench case as there is no reference to it in his judgment. On the other hand, a Division Bench of this Court in the case of *Hijaban* v. *Ali Sher Khan* (3) adhered to the view expressed in *Abdul Kadir's* case.

Numerous cases must have been decided, though not reported, on the assumption that the view of the disciples is to be preferred. When the law has been interpreted in a particular way, it may well be that in some cases the law governing the rights of the parties to a marriage was implied as a part of the terms of the contract of marriage.

No doubt, in Oudh, a Bench of that court has taken a contrary view, but the Oudh Court was not bound to follow the opinion expressed by the Full Bench of this Court; and further, in Oudh, the difficulty of a wife insisting on the previous payment of an unreasonably high dower, which is beyond the means of her husband, does not at all arise, for under section 5 of the Oudh Laws Act the courts of Oudh have power to reduce the amount of the dower debt if it is "excessive with reference to the means of the husband", though in fact agreed upon. It also appears that the authorities placed before the Oudh Court were those quoted in the judgment of Maulvi Sami Ullah and were all one way. The authorities in support of the contrary view were apparently not cited before them. Nor is it clear that the effect of the point having been left open in the later commentaries was put prominently before the learned Judges.

It is true that in the other High Courts the question has not been re-examined in the light of the original authorities, but the observation of MAHMOOD, J., has

(1) Weekly Notes, 1906, p. 136. (2) (1880) I. L. R., 2 All., 831.
(3) (1921) 19 A. L. J., 880.

been simply followed. It is also true that a Bench of the Calcutta High Court in *Hamidunnessa Bibi's* case (1), one member of which, PETHERAM, C. J., had been a party to the Full Bench of Allahabad in *Abdul Kadir's* case, thought that according to the Fatawa Alamgiri the practice of the later jurists was to follow the two disciples; whereas, in point of fact, the Fatawa Alamgiri also in one sense leaves the matter open. But the fact remains that throughout India, excluding Oudh, the same view has prevailed for several decades.

I therefore consider that it would now be dangerous to go back upon this course of decisions and not to adhere to the well recognized principle of *stare decisis*, particularly when at the time when MAHMOOD, J., made his observation it was to some extent open to him to prefer the view of the disciples.

In this view of the matter, I hold that the rule laid down in *Abdul Kadir's* case (2), though an *obiter dictum*, must be followed even though the analogy of sale may not be accepted. It may be re-stated as follows :

The absolute right of a wife to insist on the payment of the whole of the prompt portion of her dower before restitution of conjugal rights (except when the husband wants to take her out on a journey to another town) is lost after the consummation of the marriage, unless the consummation took place when she was a minor or of insane mind so as to be incapable of giving consent.

Just as we respect the observation made as regards the loss of the right of the wife on consummation, even though it be an *obiter dictum*, we must in the same way respect the other observation—though an equal *obiter dictum*—made in *Abdul Kadir's* case that "Courts of justice in India, in the exercise of their mixed jurisdiction as courts of equity and law, are at full liberty to pass conditional decrees to suit the exigencies of each particular case." (page 169). MAHMOOD, J., undoubtedly

(1) (1890) I.L.R., 17 Cal., 670. (2) (1886) I.L.R., 8 All., 149.

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held that the loss of the absolute right of the wife to resist the claim for restitution of conjugal rights did not prevent the court from making the previous payment of the dower debt a condition precedent to the execution of the decree for restitution of conjugal rights. At page 157 it was observed: "That the latter right" (the right of dower) "may modify and affect the former" (right of cohabitation) "cannot be doubted; how it affects and modifies it is the main subject of this reference." The observation at page 160 shows that the contention for the wife was that the right of cohabitation does not accrue to the husband at all until he has paid the prompt dower. The observation at page 160 has already been quoted. At page 170 it was stated: "It is one thing to say that such a defence may be set up under certain conditions; it is a totally different thing to say that until the dower was paid no cause of action could accrue to the plaintiff. The payment of dower not being a condition precedent to the vesting of the right of cohabitation, a suit for restitution of conjugal rights, whether by the husband or by the wife, would be maintainable upon refusal by the other to cohabit with him or her; and in the case of a suit by the husband, the defence of payment of dower could, at its best, operate in modification of the decree for restitution of conjugal rights by rendering the enforcement of it conditional upon payment of so much of the dower as may be regarded to be prompt." Similarly at page 171 the conclusion was: "So that, pushing the analogy of the law of sale to its fullest extent, the right of a Muhammadan wife to her dower is at best a lien upon his right to claim cohabitation, and I am unaware of any rule of Muhammadan law which would render such lien capable of being pleaded so as to defeat altogether the suit for restitution of conjugal rights."

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It is thus clear that the learned Judge was prepared to make the decree for restitution of conjugal rights conditional upon the payment of the dower debt. This, for

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all practical purposes, would amount to upholding the right of the widow to claim her dower, even though consummation of marriage has taken place, the only difference being that the power of the court to impose such terms is held to be based on the general rules of justice, equity and good conscience and not on the strict principles of the Muhammadan law as now interpreted.

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This view was accepted by the Punjab Chief Court in the case of *Mst. Saleh Bibi* v. *Rafi Uddin* (1); and the passing of a conditional decree was approved by a Bench of this Court in the case of *Hijaban* v. *Ali Sher Khan* (2). No doubt no conditional decree was passed in the case of *Kunhi* v. *Moidin* (3) nor in the case of *Hamidunnessa Bibi* v. *Zohiruddin Sheik* (4). But the point does not appear to have been raised in those cases. *Nawab Wazir Jahan Begam* v. *Nawab Haidar Raza Khan* (5) was apparently a Shia case.

It is argued on behalf of the respondent that the husband has a substantive right to claim restitution of conjugal rights after consummation, even though the dower has not been paid. It is said that this right is not a matter of mere procedure but is a substantive right under the Muhammadan law which the court has no discretion to refuse. Their Lordships of the Privy Council in the case of *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begam* (6) observed that a suit for restitution of conjugal rights, though in the nature of a suit for specific performance is in reality a suit to enforce a right under the Muhammadan law and the courts should have regard to the principles of Muhammadan law. The observation of their Lordships was directed to emphasising the point that courts should not exercise their discretion in complete supersession of the Muhammadan law, but that in exercise of their discretion they should refer to that law. But the principle was fully

(1) [1889] Punj. Rec., No. 164.
(2) (1921) 19 A. L. J., 880.
(3) (1888) I. L. R., 11 Mad., 327.
(4) (1890) I. L. R., 17 Cal., 670.
(5) (1905) 10 Oudh Cases, 11.
(6) (1867) 11 Moo. I. A., 551.

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recognized that in passing a decree for the restitution of conjugal rights the court has power to take into account all the circumstances of the case and impose terms which it considers to be fair and reasonable.

The rule may, therefore, be re-stated as follows:

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There is no absolute right in a husband to claim restitution of conjugal rights against his wife unconditionally; the courts have a discretion to make the decree conditional on the payment of her unpaid dower debt or to impose other suitable conditions considered just, fair and necessary in the circumstances of each case.

Applying these principles to the case before us I would hold that the condition of the previous payment of the dower debt should be imposed on the decree for restitution of conjugal rights, if passed. My reasons are as follows:

(1) There are original texts of unquestionable authority where such a condition has been directed.

(2) The amount of the dower debt is not excessive, and there is no suggestion that it is in any way beyond the means of the plaintiff who claims to be related to the late Nawab of Rampur.

(3) The present plaintiff had contested the defendant's claim for dower, and in spite of his contest the defendant obtained a decree which has now become final.

(4) The present suit was instituted after the institution of the suit for dower, and if the defendant is compelled to go to live in the plaintiff's house she may find it very difficult to realise her decree for dower which would in that event become futile.

(5) The plaintiff had remained quiet and did not sue for restitution of conjugal rights till the claim for dower had been made in court and there is ground for apprehending that the suit is by way of nullifying the decree for dower. As a matter of fact, the decree for dower was

attached by the plaintiff in execution of his decree for restitution of conjugal rights when the defendant refused to obey the decree.

(6) The conduct of the plaintiff as disclosed by the finding on the next point makes it fair and just that he should be called upon to pay the dower debt before he has possession of his wife.

Sulaiman, C.J.

The *next* question is whether the defendant succeeded in establishing legal cruelty which would disentitle the plaintiff from claiming restitution of conjugal rights. That question is one of fact and depends mainly on oral evidence.

The learned Subordinate Judge who heard the witnesses has recorded a clear finding against the defendant. It has to be conceded that the Subordinate Judge was in a better position to judge whether the statements of the witnesses were credible, because he was in a position to mark their demeanour which we, who have to go by the written evidence only, are not. I would accordingly be most reluctant to take a view contrary to that held by the Subordinate Judge, but as it is not only a mere question of a right to property but of compelling the defendant to go and live with her husband against her will, when there may possibly be an apprehension of danger to her life or person, it is our duty to examine the evidence afresh, and satisfy ourselves that the finding of the court below is correct. The points to which the learned Subordinate Judge has not attached due weight or which he has altogether overlooked are the following:

(*a*) When the question is of the husband's cruel treatment towards his wife, evidence of a large number of witnesses cannot be expected to be forthcoming, and much will depend on the statement of the wife corroborated by the circumstantial evidence, particularly when the cruelty is alleged to have taken place inside the house of her husband.

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(*b*) In the written statement the defendant had made specific allegations as regards the keeping of Musammat Hibia as a mistress inside the house and her own ill-treatment by her husband. This gave sufficient opportunity to the husband to produce rebutting evidence.

Sulaiman, C.J.

(*c*) Although the learned Judge has held that the defendant has failed to prove any legal cruelty against her, the positive finding recorded by him only amounts to saying that she has tried to exaggerate her allegations because her dower was not paid.

(*d*) Dealing with the witnesses, the learned Subordinate Judge has said * * * * [A portion of the judgment dealing with the oral evidence and the criticisms of the lower court on it is omitted here.]

(*i*) The most important circumstance, which has appealed to me, has been entirely ignored by the learned Subordinate Judge. There is the outstanding fact that the daughter of the parties is with her father and not with her mother. Paragraph 2 of the plaint admitted that the daughter was born after October, 1926; and the plaintiff at the end of his examination-in-chief stated that the daughter at the time was one and a half years old. Under the Muhammadan law the mother has the right to the custody of the person of her daughter till she attains puberty. The plaintiff has no female relation in his house except his mother, who admittedly has a touch of insanity. The fact that the husband and the wife are living separately and in different houses, but that their girl, aged 1½ years, remains with the father is a startling fact, the significance of which has been overlooked by the court below.

(*j*) It is to be seen how the parties have tried to explain this significant circumstance. According to the plaintiff the wife was taken away by her relations on a pretext and she took her daughter with her; but later on they refused to send back the wife to the plaintiff, but returned his daughter. According to the defendant,

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she was ill-treated by the plaintiff and was ultimately turned out of the house by being placed in a conveyance called *thela* (a covered vehicle driven by one or more coolies) and sent to her house which is close by, but the daughter was taken away from her by force and not sent with her.

Sulaiman, C.J.

(*k*) It seems to me that when the ordinary feelings of a mother are borne in mind and when under the law the wife is entitled to the custody of her minor daughter, particularly when she is of such a tender age as to require nursing and suckling, it is most difficult to believe that the mother and her relations would be so steel-hearted as to take away the infant from the breast of her mother and send her away to her father's house where there is no female relation who would be capable of looking after her comfort and safety. On the other hand, it is not at all improbable that if there is a serious quarrel between husband and wife and the husband in anger turns his wife out and forcibly puts her in a conveyance and sends her away, he may, in order to injure her feelings all the more, keep back their daughter, retain her in his house and not allow the mother to take her away with her. In my opinion the fact that the girl has remained with the husband strongly points to the conclusion that the wife was compelled to leave the husband's house and to leave her girl behind against her will, and not that having left her house with her girl in perfect harmony she voluntarily sent the girl back to her husband afterwards.

In view of all these circumstances I am compelled to hold that the learned Subordinate Judge has not appreciated the seriousness of the evidence that was led before him and has been led away by unjustifiable considerations to think that the defendant's story was grossly exaggerated and that there was no case of legal cruelty.

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In fairness to him it must be pointed out that there is certainly a possibility that the story told by the defendant that she was beaten with *lathis* and shoes might not be true, but I have no hesitation in holding that the fact that Mst. Hibia, a mistress, was kept in the same house with the wife is fully established and I do not believe the denial made by the husband nor do I accept the statements of his two brothers, who, admitting the presence of Mst. Hibia in the house, tried to explain it away by saying that she was a mere maid-servant of the insane mother. These brothers do not live in the same part of the house and are therefore not in a position to know about the relations between the husband and Mst. Hibia to the same extent as the wife living under the same roof would be able to see for herself. Further, I think that in view of the claim for dower brought by the wife these brothers are supporting the plaintiff. I have no hestitation in holding that the husband misbehaved in this way that he kept a mistress in his house along with his wife and caused mental pain to her in consequence and that he must have, when quarrels ensued, treated his wife cruelly; and that as the quarrels were not and could not be patched up, so long as Mst. Hibia remained in the house, the defendant No. 1 had reasonable apprehension of injury to her person.

I think that the wife is fully justified in refusing to go and live with her husband so long as there is no undertaking not to keep any mistress in the house; she can go to live with him only if a separate house is given to her. Further, I think that in order to protect her safety it is necessary that she should have the option of keeping one female servant and one male servant, according to her choice, in the house. Mr. *Khwaja* on behalf of the husband agrees to the last mentioned conditions.

As regards defendants Nos. 2 to 5, the learned Subordinate Judge has quite wrongly thrown the burden of proof upon them. The point made against them is that they did not agree to depose on oath that

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they had not taken away Mst. Anis Begam and that they did not produce any evidence to prove that they did not accompany her from the plaintiff's house or that they were willing to let Mst. Anis Begam return to the plaintiff. The learned Subordinate Judge says that he does not believe that if the defendants Nos. 2 to 5 were not interfering, Mst. Anis Begam would not have returned to the plaintiff for such a long time. I think that his conclusion is quite unjustifiable. When the defendant was treated in the way she was, it is natural for the defendants to offer her protection. It is unthinkable that when a daughter comes back to her parents' house seeking protection from the ill-treatment of her husband, the parents would close their door against her, or that when the husband comes and demands back his wife they would forcibly and against the will of their daughter send her back to her husband's house. No decree for injunction can be passed against them unless it is clear that they are not only offering protection to their neglected daughter, but that they are actually preventing her from going, or, at any rate, inducing her not to go to her husband. The evidence on this point is almost nil. There is the solitary and vague statement of the plaintiff that the defendants are keeping away his wife in order to press him to transfer his property to her. This is merely an inference or perhaps an explanation why he has impleaded these defendants. This was not put to the wife when she was in the witness box. As a matter of fact, Mst. Anis Begam distinctly stated that it was incorrect to say that her father, paternal uncle, brother or maternal uncle brought her from her husband's house and categorically stated that these people do not prevent her from going to his house. The two witnesses produced by the plaintiff do not allege that the other defendants have done anything to prevent the defendant from returning to her husband's house. The evidence against the defendants is therefore nil, and I am surprised that the

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learned Subordinate Judge should have decreed the claim against them by throwing the onus upon them.

I would accordingly allow the appeal in part and impose conditions on the decree for the restitution of conjugal rights.

THOM, J. :—I concur.

BY THE COURT :—We accordingly allow this appeal and modifying the decree of the court below pass the following decree in lieu thereof :

The plaintiff's claim for restitution of conjugal rights against defendant No. 1 is decreed on the following conditions : (1) The decree shall be subject to the payment of Rs.15,000, the amount of the prompt dower of the defendant (exclusive of costs decreed) and the decree for restitution of conjugal rights shall not be executable so long as any part of the principal amount of the dower debt remains unpaid or unrealised. (2) When the dower debt has been paid and realised in full, the plaintiff will be entitled to execute his decree for restitution of conjugal rights, provided he sets apart a house for the residence of his wife, offers to pay her maintenance allowance and allows her to keep one female and one male servant, according to her choice, at the house, and undertakes not to allow any other woman to live in his house to whom the defendant No. 1 objects.

We also think that in the circumstances of the case the defendant No. 1 should have her costs of the suit in both the courts, and that the plaintiff's claim as against the defendants Nos. 2 to 5 should be dismissed with costs in both the courts.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji, and Mr. Justice King

SAHU SHYAM LAL (DEFENDANT) *v.* SHYAM LAL (PLAINTIFF)*

1933
April, 26

Civil Procedure Code, order XXIII, rule 3—Compromise decree—"So far as it relates to the suit"—Part of the compromise going outside the subject matter of the suit—Decree incorporating and giving effect to the whole compromise—Validity of decree—Jurisdiction.

A suit for dissolution of partnership was compromised, one of the terms being that the defendant was to pay a certain sum in instalments; and certain property specified in the compromise was to be deemed hypothecated for the due payment, in default of which the plaintiff might realise his money by sale of the property in execution of the compromise decree. A decree was passed incorporating and giving effect to the whole compromise. The compromise was not registered, nor attested as a mortgage deed would be. In execution of the decree the property was sold and the decree-holder purchased it. The question arose as to whether he had obtained a good title. *Held* that the decree was not one passed without jurisdiction and neither it nor the sale founded on it was a nullity, and the purchaser had got a good title.

So long as the compromise relates to the suit, the court has full authority under order XXIII, rule 3 of the Civil Procedure Code to pass a decree in terms of the compromise even though it might not have, strictly speaking, formed the subject matter of the suit.

No doubt it is the duty of the court, under order XXIII, rule 3, to see that although the whole of the compromise between the parties is recorded, the operative portion of the decree is confined to that part only which relates to the suit. A proper and effectual method of carrying out the terms of the rule would be for the decree to recite the whole of the agreement and then to conclude with an order embodying those matters which relate to the suit, or the agreement could be

*Second Appeal No. 201 of 1930, from a decree of Pran Nath Aga, Additional Subordinate Judge of Moradabad, dated the 4th of November, 1929, confirming a decree of Maharaj Bahadur Lal, Munsif of Chandausi, dated the 30th of April, 1929.

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introduced in a schedule to the decree; but, in either case, although the operative part of the decree would be properly confined to the actual subject matter of the then existing litigation, the decree taken as a whole would include the agreement. But it does not necessarily follow that if the court does not strictly follow this direction, it is acting without jurisdiction.

Even in cases where a part of the compromise does not, strictly speaking, relate to the suit and nevertheless the court decides that it relates to the suit and incorporates it into the operative portion and passes a decree in terms of it, the decree is not a nullity and not one passed without jurisdiction, but would be binding upon the parties to the decree and its validity cannot be questioned in the execution department, nor can any title derived under it be attacked.

The expression, "so far as it relates to the suit", in order XXIII, rule 3 is wider than the expression, "so far as relates to so much of the subject matter of the suit as is dealt with by the compromise", which occurred in section 375 of the former Code; and matters which may not, strictly speaking, be the subject matter of the suit itself as brought may yet "relate to the suit".

Mr. *Panna Lal*, for the appellant.

Mr. *S. N. Seth*, for the respondent.

SULAIMAN, C. J., MUKERJI and KING, JJ. :—This case has been referred to a Full Bench because of certain important questions of law which arise in it. It appears that Sahu Shyam Lal instituted suit No. 125 of 1923 in the court of the Subordinate Judge of Moradabad for dissolution of his partnership with Kalyan Das and others. On the 25th of December, 1923, the parties compromised their dispute and a written compromise was filed in court. Under this compromise, apart from the liability to pay Rs.1,000, the defendant agreed that Rs.1,500 were further due to the plaintiff from the defendant and he agreed to pay the amount in annual instalments of Rs.150 each, spread over a number of years. It was also provided that in default of payment of any instalment, the whole of the amount would become due and would be payable

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with interest at 1 per cent. per mensem and it further provided that the property specifically mentioned in the compromise would remain (*makful* and *marhun*) hypothecated and mortgaged for the amount due to the plaintiff and that the defendant shall not transfer or encumber the same property and that in case of breach of any of the conditions the plaintiff would be entitled to realise the amount by sale of the aforesaid property by execution of this decree without bringing a fresh suit.

The court passed a decree in terms of this compromise and incorporated the whole of the compromise into the decree. It may be noted that this compromise was neither registered nor was it attested as a mortgage deed would be.

Subsequently one Gopal Ram brought a money suit No. 439 of 1926 against Kalyan Das and others and obtained a decree. After attaching the property mentioned in the previous decree he proceeded to execute his decree by sale of the same. Sahu Shyam Lal applied that his charge over the property should be declared at the time of the auction. This request was granted. The auction sale in execution of Gopal Ram's decree took place with the announcement of the incumbrance and the property was purchased for Rs.14 by Munshi Shyam Lal, who is a different person from Sahu Shyam Lal.

When Sahu Shyam Lal executed his decree in suit No. 125 of 1923 by sale of this property Munshi Shyam Lal, the auction purchaser, objected, but his objection was disallowed and the property was again sold at auction in execution of Sahu Shyam Lal's decree and the property was purchased by Sahu Shyam Lal for Rs.550.

The present suit was instituted by Munshi Shyam Lal principally against Sahu Shyam Lal for a declaration that the purchase made by him previously was

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good and that the property was vested in him and that the present purchase by Sahu Shyam Lal was invalid and not binding upon him.

Both the courts below have decreed the suit in favour of the plaintiff, holding that the compromise in suit No. 125 of 1923 was in the nature of creating a mortgage on immovable property, and not being registered was inadmissible in evidence and the court acted without jurisdiction in so far as it created a mortgage on immovable property. It was held that all subsequent proceedings including the auction purchase by Sahu Shyam Lal were null and void. Sahu Shyam Lal has come up in appeal to this Court and challenges the finding of the courts below.

It is quite obvious that if the court had no jurisdiction to incorporate any part of the compromise into the decree, the decree would be *ultra vires* and therefore void and a nullity and the auction purchase would fall with it. On the other hand if the court had jurisdiction to entertain the compromise, then even if it acted in an irregular manner or acted illegally or committed an error of law the decree when passed would be one passed with jurisdiction and binding on the parties unless set aside in appeal or by way of review of judgment.

It is possible to conceive of cases where a civil court would not have jurisdiction to pass a decree even if it is based on a compromise between the parties. For instance, a small cause court may not have jurisdiction to deal with rights to immovable properties, or a revenue court may not have jurisdiction to deal with immovable property, or even a Munsif's court may not have pecuniary jurisdiction to deal with properties of higher valuation, or again a civil court may not have jurisdiction to deal with matters which are exclusively within the jurisdiction of the revenue courts. On the other hand, it appears to have been contemplated

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by the legislature that there may be matters which are irrelevant to the suit and should be ignored by the court and only such matters as relate to the suit be incorporated in the decree.

Order XXIII, rule 3 of the Code of Civil Procedure provides that where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit. These words appeared in the old section 375 but the section proceeded to add "and such decree shall be final so far as relates to so much of the subject matter of the suit as is dealt with by the agreement, compromise or satisfaction".

It seems to us that the expression "so far as it relates to the suit" is somewhat wider than the expression "so far as relates to so much of the subject matter of the suit as is dealt with by the compromise". It is certainly possible to conceive of matters which may not, strictly speaking, be the subject matter of the suit itself as brought and yet they may relate to the suit. It therefore follows that so long as the compromise relates to the suit the court has full authority under this rule to pass a decree in terms of it even though it might not have, strictly speaking, formed the subject matter of the suit.

Similarly there is nothing in section 2 of the Code of Civil Procedure, which defines the decree, which would prevent the court from passing a decree in terms of the compromise which relates to the suit although it may not be called the subject matter of the suit. All that it requires is that the court may determine the rights of the parties in regard to all or any matters in controversy in

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the suit, viz., matters that may be in controversy in the suit and matters that may be brought in by the parties If the property has not been included in the suit it can be so included by a proper amendment of the plaint. The court would therefore have proper jurisdiction to deal with it. The fact that the court deals with it before going through the formality of amending the plaint would be an illegality or non-compliance with the provisions of the second schedule, and not necessarily a question of jurisdiction. Where the court has jurisdiction to deal with the property, having regard to its nature, character and valuation, the mere fact that it was not originally included in the plaint would not oust the jurisdiction of the court when it was acting upon the agreement of the parties.

No doubt it is the duty of the court to see that although the whole of the compromise between the parties is recorded, the operative portion of the decree is confined to that part only which relates to the suit. This point was emphasised by their Lordships of the Privy Council in *Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (1). Following the observations made by their Lordships of the Privy Council on page 495, we think that a perfectly proper and effectual method of carrying out the terms of this section would be for the decree to recite the whole of the agreement and then to conclude with an order embodying those matters which relate to the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject matter of the then existing litigation, the decree taken as a whole would include the agreement.

It is incumbent on courts to follow this direction and to see that the final order passed by the court is correct. But it does not necessarily follow that if the court does not strictly follow this direction, it is acting without jurisdiction.

(1) (1919 I. L. R., 47 Cal., 485.

In some cases it may be very easy to split up the compromise into two parts,—the first which relates to the suit and the second which does not relate to the suit, and then it would be very easy for the court to incorporate into the operative portion of the order the part which relates to the suit, and to exclude the other which does not relate to the suit. On the other hand, there can be a compromise which mixes up various matters in such a way as to make it impossible to separate the part which exclusively relates to the suit and another part which does not so relate to the suit. It will therefore be the duty of the court to decide which relates to the suit and which does not relate to it. Such a question obviously is a question of law to be decided by the court which is called upon to pass a decree on a perusal of the compromise. The court in deciding this matter may err, but the court would have jurisdiction to decide a point of law wrongly. Except in cases where the court had no jurisdiction to entertain the matter at all, a wrong decision would make the decree valid and binding on the parties. No doubt there has been some conflict of opinion on this point. It was held in the case of *Mohibullah* v. *Imami* (1) that a court had jurisdiction to award to the plaintiff a larger amount than was claimed if the amount is decreed on a compromise between the parties. In a later case in *Raghubans Mani Singh* v. *Mahabir Singh* (2) there was an observation at pages 80-81 which was in the nature of an *obiter dictum* that the decree of a court will be enforceable as a decree only so far as it relates to the subject matter of the suit. The learned Judges were not called upon to decide whether, if the court wrongly decided that a certain agreement related to the suit and passed a decree on it, the decree would be a nullity and would not be binding on the parties to it. The view which has prevailed in Madras and also in Oudh seems to be to the effect that even though it incorporates some part of it which did not, strictly speaking, relate to the

(1) (1887) I. L. R., 9 All., 229. (2) (1905) I. L. R., 28 All., 78.

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suit, it would nevertheless not be *ultra vires*. On the other hand, the earlier Calcutta cases and some cases of the Punjab Chief Court seem to lay down that a court could not pass a decree in terms of the compromise which do not relate to the suit.

We think that even in cases where a part of the compromise does not, strictly speaking, relate to the suit and nevertheless the court decides that it relates to the suit and incorporates it into the operative portion and passes a decree in terms of it, the decree is not a nullity and not one passed without jurisdiction, but would be binding upon the parties to the decree and its validity cannot be questioned in the execution department, nor can any title derived under it be attacked. In this view of the matter it is not necessary for us to consider the question whether the compromise did or did not attempt to create a mortgage. *Prima facie*, having regard to the language used and the intention that the property shall not be liable to be transferred or encumbered so as to prejudice the plaintiff, it was in the nature of a mortgage. The mere fact that it was not registered or not properly attested would not make a document inadmissible, but we think it is not necessary to express any final opinion on the point in this case.

It has been contended before us that inasmuch as the court has merely ordered that the decree should be passed in terms of the compromise it was not necessary to incorporate the whole of the compromise into the operative portion of the decree. No doubt the lower court intended to incorporate the whole of the compromise into the operative part of the decree as was actually done when the decree was prepared. We might also add that even if our view had been different, we would not have readily accepted the contention that the direction, that the money decree to be paid in instalments should be realised in case of default by sale of the property specified in the execution department, would necessarily

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be a provision which would amount to an agreement not relating to the suit.

We accordingly allow the appeal and setting aside the decree of the court below dismiss the suit with costs throughout.

APPELLATE CRIMINAL

Before Mr. Justice King and Mr. Justice Iqbal Ahmad

EMPEROR *v.* RAGHO RAM*

1933
April, 26

Indian Penal Code, section 477A—Falsification of register with intent to conceal previous embezzlement—"Intent to defraud"—"Dishonestly"—Indian Penal Code, sections 23, 24.

The word "dishonestly" does not occur in section 477A of the Indian Penal Code, and all that is necessary to bring a person within the purview of that section is that he should have altered or falsified any book or paper etc. wilfully and with intent to defraud.

The terms "fraud" and "defraud" are not defined in the Indian Penal Code, but it is clear that if the intention with which a false document is made is to conceal a fraudulent or dishonest act which had been previously committed, the intention cannot be other than an intention to defraud. The concealment of an already committed fraud is a fraud.

A document that is made with the intention of concealing a dishonest act already committed is made "dishonestly" within the meaning of section 24, read with section 23, of the Indian Penal Code as it facilitates the retention of the wrongful gain already made.

Making a false document with a view to prevent persons already defrauded from ascertaining that misappropriations had been committed, and thus to enable the person who committed the misappropriations to retain the wrongful gain which he had secured, amounts to the commission of a fraud and brings the case under section 477A of the Indian Penal Code.

* Criminal Appeal No. 501 of 1932, by the Local Government from an order of R. K. Mitter, Sessions Judge of Jaunpur, dated the 9th April, 1932.

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Shuja-ud-din Ahmad v. *Emperor* (1), *Empress of India* v. *Jiwanand* (2), *Queen-Empress* v. *Girdhari Lal* (3), *Queen* v. *Lal Gumul* (4) and *Queen* v. *Jageshur Pershad* (5), dissented from.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

Mr. *Gopalji Mehrotra*, for the accused.

KING and IQBAL AHMAD, JJ. :—This is an appeal by the Local Government against the acquittal of Ragho Ram, respondent, of charges of falsification of accounts under section 477A of the Indian Penal Code.

Ragho Ram was the goods clerk in charge of the goods office at Jaunpur, E. I. Railway station. He misappropriated various sums of money that were paid by consignees of goods on account of the freight of consignments. He was accordingly prosecuted under section 409 of the Indian Penal Code for having committed criminal breach of trust with respect to three items and the learned Assistant Sessions Judge convicted him and sentenced him to rigorous imprisonment for three years and also to a fine of Rs.500. The conviction and sentence were on appeal upheld by the learned Sessions Judge. Ragho Ram filed an application in revision in this Court against the appellate order of the learned Sessions Judge and we have today dismissed that application.

Ragho Ram was separately tried under section 477A of the Indian Penal Code for having fraudulently falsified the delivery book with a view to cover the defalcations made by him. The evidence shows that when a consignment of goods was sent from any station to Jaunpur, an invoice was sent to Jaunpur containing details of the consignment, and this invoice was copied into the left hand page of the delivery book in the goods office and after the delivery of the goods to the consignee the right

(1) (1922) 20 A. L. J., 662.
(2) (1882) I. L. R., 5 All., 221.
(3) (1886) I. L. R., 8 All., 653.
(4) (1870) 2 N.-W. P. H. C. R., 11.
(5) (1873) 6 N.-W.-P. H. C. R., 56.

hand page of the delivery book was also filled in. Sometimes through mistake it so happened that an invoice was copied in twice over in different places on the invoice side of the delivery book, and when the goods arrived and delivery was effected the relevant entry on the delivery side of the register was made as against one of the invoice entries. In such cases the second invoice entry remained without any entries being made on the delivery side, and when the mistake of the double entry of the invoice was detected a note used to be made against the second invoice entry on the delivery side, that the consignment had been twice accounted for and a reference used to be made to the page and number of the first invoice entry. The method adopted by Ragho Ram for misappropriating the freight paid to him was as follows: In cases where two consignments of similar goods were received, he misappropriated the freight of one consignment and altered the details on the invoice side of the entry relating to that consignment in such a manner as to make it appear that the consignment was the same as another consignment whose freight was duly credited, and an entry used to be made by him on the delivery side against the invoice relating to the consignment, the freight of which had been misappropriated by him, that it had been twice accounted for.

The learned Assistant Sessions Judge held that it was satisfactorily proved that Ragho Ram falsified the delivery book, and accordingly convicted him under section 477A of the Indian Penal Code and sentenced him to rigorous imprisonment for a term of three years as well as to a fine of Rs.500 and, in default of payment of fine, to six months' simple imprisonment. But as Ragho Ram had been sentenced to the same period of imprisonment in the case under section 409 of the Indian Penal Code he ordered the sentences of imprisonment in both the cases to run concurrently. The learned Sessions Judge on appeal agreed to the finding of the learned Assistant Sessions Judge that the false entries in

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question were made by Ragho Ram, but relying on the decision of this Court in *Shuja-ud-din Ahmad* v. *Emperor* (1), held that as Ragho Ram falsified the delivery book not with the intention of causing any wrongful gain or wrongful loss, or defrauding any one, but with the intention of screening his past guilt, he could not legally be convicted under section 477A of the Indian Penal Code. He accordingly acquitted Ragho Ram.

In the reported case one Shuja-ud-din who was a liquidation clerk was tried under section 408 of the Indian Penal Code for having committed criminal breach of trust with respect to various sums of money received by him in the course of his duty from different persons, which sums he ought to have deposited in the bank, and was also separately tried under section 477A of the Indian Penal Code for making false entries in the accounts maintained by him in the discharge of the duties entrusted to him as liquidation clerk. He was convicted under both the sections by the learned Sessions Judge, but on appeal a learned Judge of this Court acquitted him of the charge under section 477A of the Indian Penal Code, on the ground that the object with which the false entries were made by Shuja-ud-din "was not to defraud any one by making the false entries but it was in the main to save himself from the consequences of defalcations". In support of this view the learned Judge relied on the decisions of this Court in *Empress of India* v. *Jiwanand* (2) and *Queen-Empress* v. *Girdhari Lal* (3). In those cases it was held by this Court that when a clerk, who had committed criminal breach of trust, subsequently made false entries in an account book, with the intention of concealing the criminal breach of trust committed by him, he could not be convicted of the offence of forgery under section 465 of the Indian Penal Code. In the case of *Empress of India* v. *Jiwanand* (2) the learned Judge, after referring

(1) (1922) 20 A. L. J., 662.
(2) (1882) I. L. R., 5 All., 221.
(3) (1886) I. L. R., 8 All., 653.

to the definition of "forgery" in section 463 of the Indian Penal Code, observed that in order to constitute the offence of forgery a "dishonest" or "fraudulent" intent is absolutely essential. He then referred to the definition of the word "dishonestly" in section 24 and of the word "fraudulently" in section 25 of the Indian Penal Code and formulated the question for decision in the following words: "Did the prisoner intend to cause wrongful loss or wrongful gain to any person, or did he intend to defraud any one?" He answered the question in the negative on the ground that "It is clear that intention, *ex necessitate rei*, relates to some future occurrence and not to the past. It cannot be said, when wrongful loss or wrongful gain has already been caused, or a person has already defrauded, anything can be subsequently done which could be dictated with the intention to cause that which has already occurred." The case of *Empress of India* v. *Jiwanand* (1) was followed in the decision in *Queen-Empress* v. *Girdhari Lal* (2) referred to above. These cases are undoubtedly authorities for the proposition that if a person, with the intention to conceal a fraud which had been previously committed by him, makes or alters a document he cannot be said to have acted "dishonestly" within the meaning of section 24 or to have acted "fraudulently" within the meaning of section 25 of the Indian Penal Code. To the same effect are the decisions of this Court in *Queen* v. *Lal Gumul* (3) and *Queen* v. *Jageshur Pershad* (4).

We are unable to agree to the decisions of this Court to which reference has been made above. It is true that in order to constitute the offence of forgery as defined by section 463 of the Indian Penal Code it is essential that a "false document" should have been made as explained by section 464 of the Indian Penal Code. In other words, an act which is said to constitute forgery

(1) (1882) I. L. R., 5 All., 221.
(2) (1886) I. L. R., 8 All., 653.
(3) (1870) 2 N. W. P., H. C. R., 11.
(4) (1873) 6 N. W. P., H. C. R., 56.

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must amount to making a false document within the meaning of section 464 and as in section 464 the words "dishonestly or fradulently" occur, a document cannot be a "false document" unless it is prepared with a dishonest or fradulent intent.

Section 23 of the Code defines "wrongful gain", "wrongful loss" and "gaining wrongfully; losing wrongfully". The next section 24 provides that "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another is said to do that thing dishonestly." Section 25 provides that "person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." It is manifest therefore that in order to constitute the offence of forgery a document should have been made either with the intention of causing wrongful gain or wrongful loss or with intent to defraud some person. But there is nothing in the Code to justify the assumption that the intention to cause wrongful gain or wrongful loss, or the intent to defraud, contemplated by sections 24 and 25 of the Code has reference to some future occurrence and not to the past. If the intention with which a false document is made is to conceal a fraudulent or dishonest act which had been previously committed, we fail to appreciate how that intention could be other than an intention to commit fraud. The concealment of an already committed fraud is a fraud.

The terms "fraud" and "defraud" are not defined in the Code. Sir James FitzJames Stephen in his History of the Criminal Law of England, volume II, page 121, observes that "whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements at least are essential to the commission of the crime; namely, first, deceit or an intention to deceive, or in some cases mere secrecy; and secondly, either actual injury or possible injury,

or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy." "This intent", he adds, "is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage . . . A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known? If so, it is hardly possible that the advantage should not have had an equivalent in loss or risk of loss to some one else, and if so, there was fraud." Where, therefore, there is an intention to obtain an advantage by deceit there is fraud and if a document is fabricated with such intent, it is forgery. A man who deliberately makes a false document in order to conceal a fraud already committed by him is undoubtedly acting with intent to commit fraud, as by making the false document he intends the party concerned to believe that no fraud had been committed. It requires no argument to demonstrate that steps taken and devices adopted with a view to prevent persons already defrauded from ascertaining that fraud had been perpetrated on them, and thus to enable the person who practised the fraud to retain the illicit gain which he secured by the fraud, amount to the commission of a fraud. An act that is calculated to conceal fraud already committed and to make the party defrauded believe that no fraud had been committed is a fraudulent act and the person responsible for the act acts fraudulently within the meaning of section 25 of the Code. Further, it is provided by section 23 of the Code that "A person is said to gain wrongfully when such person retains wrongfully as well as when such person acquires wrongfully." A document that is made with the intention of concealing a dishonest act already committed is made "dishonestly" within the meaning of

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section 24 as it facilitates the retention of the wrongful gain already made. We hold, therefore, that if a document is prepared with the intention of concealing a fraud that had already been committed, and thus to enable the person who had made "wrongful gain" to retain the property that he had acquired by unlawful means, it amounts to a false document and the person making the document is guilty of forgery. The view that we take is in consonance with the decision of the Madras High Court in *Queen-Empress* v. *Sabapati* (1), the decisions of the Calcutta High Court in *Lolit Mohan Sarkar* v. *Queen-Empress* (2) and *Emperor* v. *Rash Behari Das* (3) and the decision of the Bombay High Court in *Emperor* v. *Balkrishna Waman* (4).

The respondent before us was charged under section 477A of the Indian Penal Code. That section was introduced in the Code for the first time by Act III of 1895. It is worthy of note that the word "dishonestly" does not occur in that section and all that is necessary to bring an accused person within the purview of that section is that he should have altered or falsified etc. any book, paper etc. "wilfully and with intent to defraud". It cannot be doubted for a moment that the falsification of the delivery book by the respondent was with a view to conceal the misappropriations made by him and thus to enable him to retain the amount misappropriated by him. It follows, therefore, that he by the falsification of accounts intended to and did derive an advantage for some time which he could not have derived if the books had not been falsified. There is, therefore, no escape from the conclusion that the falsification of the delivery book by the respondent was with intent to defraud and he was rightly convicted under section 477A of the Indian Penal Code by the learned Assistant Sessions Judge.

(1) (1888) I. L. R., 11 Mad., 411.
(2) (1894) I. L. R., 22 Cal., 313.
(3) (1908) I. L. R., 35 Cal., 450.
(4) (1913) I. L. R., 37 Bom., 666.

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We accordingly allow this appeal, set aside the order of acquittal passed by the learned Sessions Judge and restore the order passed by the learned Assistant Sessions Judge. The accused shall be deemed to have been serving the sentence of imprisonment passed on him in the present case concurrently with the sentence of imprisonment passed on him on the 29th of January, 1932, in sessions case No. 32 of 1931.

FULL BENCH

1933
April, 27

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King

SRI KRISHNA CHANDRA (PLAINTIFF) *v.* MAHABIR PRASAD AND OTHERS (DEFENDANTS)*

Court Fees Act (VII of 1870), *schedule II, article* 17(iii)—*Suit for a declaration that a certain decree is not binding on the plaintiff and is void and ineffectual—Cancellation not specifically prayed for—"Any other relief which may be just"—Whether consequential relief—Specific Relief Act (I of* 1877), *sections* 39, 42.

The plaintiff prayed for a declaration that a certain decree was not binding upon him and was altogether void and ineffectual; he also added the usual prayer that any other relief which in the opinion of the court might be deemed just might also be granted. *Held* that inasmuch as the plaintiff merely asked for a declaration that the previous decree was not binding on him and was altogether void and ineffectual, his suit was one for obtaining a declaratory decree only and fell under article 17(iii) of the second schedule of the Court Fees Act and the court fee payable was rupees ten only. As regards the other relief it was *held* that such a relief is unnecessarily added in most plaints and is not intended to mean anything more than reminding the court of its power to grant other reliefs even though not specifically asked for. The words of this relief were too vague and indefinite and no specific relief was referred to therein, and it could not be regarded as one which required the demand of an additional court fee or as one which, when coupled with the declaratory relief, changed the nature of the relief claimed in the suit.

*First Appeal No. 21 of 1930, from a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 15th of October, 1929.

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Where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the court cannot call upon him to pay court fees on the consequential relief which he should have claimed although he has omitted to do so.

In the case of suits falling under section 39 of the Specific Relief Act it has, no doubt, been held that although the plaintiff may merely ask for the instrument to be declared void or voidable, without expressly asking for it to be delivered up and cancelled, nevertheless the suit is not one for obtaining a mere declaratory decree but one for obtaining a substantive relief. But the case of a decree stands on a different footing, because a suit to avoid it does not strictly fall under section 39 of the Specific Relief Act. If, however, the plaintiff chooses to ask for a definite relief for the cancellation or the setting aside of the decree, in addition to a declaration that it is not binding on him, he is professedly asking for something more than a mere declaratory decree.

Kalu Ram v. *Babu Lal* (1) explained and distinguished.

A suit for a mere declaration that a certain decree is not binding on the plaintiff does not, strictly speaking, fall within the scope of section 42 of the Specific Relief Act. But that section is not exhaustive so as to exclude all other forms of declaratory suits, and declaratory suits have been entertained and declarations granted by the Privy Council which, strictly speaking, did not fall within the purview of that section. Therefore, although the view can be taken that a suit like the present is not one merely for obtaining a declaratory decree but is essentially one for obtaining a more substantive relief amounting to frustration or cancellation of the decree, yet having regard to the fact that the Court Fees Act being a fiscal measure should be construed strictly and in favour of the subject, and to the long course of decisions in this court, the court fee of ten rupees should be held to be sufficient.

Mr. *G. S. Pathak*, for the appellant.

Mr. *J. P. Bhargava*, for the respondents.

SULAIMAN, C. J., MUKERJI and KING, JJ.:—The following question has been referred to the Full Bench for an answer: "Whether the court fee of Rs.10 paid by the plaintiff on the plaint as filed by him was sufficient, and if not, what would be the proper court fee payable."

(1) (1932) I. L. R., 54 All., 812.

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The plaintiff in this case was a minor suing through a guardian and his case was that in a previous suit brought for the partition of a joint Hindu family property he was not effectively represented by his guardian who was very negligent and careless and did not properly look after his case. The suit was referred to arbitration which resulted in an award which was incorporated in the decree of the court. The plaintiff prayed for the following reliefs specifically: (*a*) It may be held that Govind Prasad, defendant third party, did not in any way look after the rights of the plaintiff during the pendency of suit No. 65 of 1927, in the court of the Subordinate Judge of Ghazipur, and that he was guilty of gross negligence on account of which the plaintiff was greatly deprived of his rights, and it may be declared that the decree No. 65 of 1927 is not in any way binding upon the plaintiff and is altogether void and ineffectual; (*b*) In addition to relief (*a*) any other relief which may, in the opinion of the court, be just may also be granted to the plaintiff against the defendants, together with the costs of this suit. He valued the subject-matter of the suit for purposes of jurisdiction at Rs.45,308 but paid a court fee of Rs.10 for the declaration that the decree is null and void. No separate valuation was given for the reliefs claimed. An attempt to supply it by way of amendment proved infructuous.

The question that arose before the Division Bench was whether the payment of Rs.10 as court fee, treating the relief claimed as one for obtaining a mere declaratory decree, was sufficient or whether the plaintiff was claiming something more, i.e. a substantial relief for which an *ad valorem* court fee should be charged.

Recently a Bench of five Judges has had to consider some provisions of the Court Fees Act in *Kalu Ram* v. *Babu Lal* (1). In that case the plaintiff had asked for reliefs for adjudging a certain mortgage deed void and ineffectual and for its cancellation and also for the

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cancellation of a compromise decree which resulted in a preliminary decree. The Full Bench pointed out that the reliefs claimed were something more than a mere declaratory decree and that the payment of Rs.10 was not sufficient.

The learned advocate for the respondents has relied strongly on a passage at page 822 where it was remarked that "If a substantive relief is claimed, though clothed in the garb of a declaratory decree with a consequential relief, the court is entitled to see what is the real nature of the relief, and if satisfied that it is not a mere consequential relief but a substantive relief it can demand the proper court fee on that relief, irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief." Obviously, the Full Bench did not intend to lay down that where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the court can call upon him to pay court fees on the consequential relief which he should have claimed although he has omitted to do so. What was held was that if the plaintiff does not ask for a mere declaratory decree, but also asks for a relief which he calls "consequential" relief, the mere fact that he calls it so would not prevent the court from demanding full court fee, if in reality the additional relief claimed was a substantive relief and not a mere consequential relief. We do not think that the observation was intended to go further than this.

On the other hand, there is no doubt that so far as suits relating to the cancellation of instruments are concerned, the Full Bench on page 821 clearly held that "A relief to have a registered instrument adjudged void or voidable, with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the registration office for a note to be made by the registering officer in his books, is much more than a mere

declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one." It was clearly pointed out that it was not incumbent on a plaintiff to ask in express terms a relief for the instrument to be delivered up and cancelled and that he might merely ask for its being adjudged void or voidable. Nevertheless, a suit which falls under section 39 of the Specific Relief Act was held to be not a suit for obtaining a mere declaratory decree, but one for obtaining a substantive relief not otherwise provided for.

The case of a decree stands on a different footing, because a suit to avoid it does not strictly fall under section 39 of the Specific Relief Act. Strictly speaking, it would not even fall within the scope of section 42 of the Specific Relief Act. Where the plaintiff chooses to ask for a definite relief for the cancellation of a decree or for the setting aside of that decree, in addition to a declaration that the decree is not binding upon him, he is professedly asking for something more than a mere declaratory decree. At the stage at which the question of court fee arises, it is immaterial to consider whether such a relief is superfluous, redundant or useless or even impossible to be granted. Obviously he has asked for more; and so long as he does not amend his plaint and abandon this relief he can be called upon to pay court fee for the relief asked for.

The case before the Full Bench (1) was of such a type. There the plaintiff had in express terms asked for the cancellation of the compromise and the preliminary decree. *Ad valorem* court fee on the consolidated prayer for the cancellation of the compromise and the decree was accordingly held to be due.

As regards the case where the plaintiff stops short of asking anything more than a mere declaration that a certain decree is not binding upon him, opinion in the various High Courts is divided. There is no doubt that section 42 of the Specific Relief Act is not exhaustive so

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as to exclude all other forms of declaratory suits. Indeed, in several cases their Lordships of the Privy Council have entertained declaratory suits and granted declarations which strictly speaking did not fall within the purview of section 42 of the Specific Relief Act. In *Robert Fischer* v. *Secretary of State for India* (1) their Lordships pointed out that that suit was to have the true construction of a statute declared and to have an act, done in contravention of the statute as rightly understood, pronounced void and of no effect. Their Lordships observed that that is not the sort of declaratory decree which the framers of the Act had in their mind. In *Partab Singh* v. *Bhabuti Singh* (2) their Lordships granted to minors, against whom a decree had been obtained by the fraud and misrepresentation of their *de facto* guardian and manager, a declaration that the decree was not binding upon them. The actual form of the decree was a decree setting aside the previous decree and declaring that the agreement of compromise and the decree based upon it were not binding upon the minors or either of them, and that they were entitled to such rights as they had before their previous suit was dismissed.

The origin and purpose of section 42 of the Specific Relief Act and the history how declaratory decrees came to be granted have been set out in the judgment of their Lordships in *Robert Fischer's* case (1). No doubt there has been some laxity in allowing plaintiffs to frame their plaints by asking for declarations of all sorts. But where a plaintiff expressly asks for something more than a mere declaration, for example, cancellation or the setting aside of a decree, it is difficult to hold that the claim is one merely for obtaining a declaratory decree. The difficulty arises only where he simply asks that it be declared that a certain decree which has been passed against him previously is null and void and is not binding

(1) (1898) I. L. R., 22 Mad., 270 (282). (2) (1913) I. L. R., 35 All., 487.

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upon him. The view taken in some cases of the other High Courts is that in such a suit the plaintiff is trying to get rid of a decree which stands in his way and which is capable of being executed against him, and that without having that decree set aside or cancelled the plaintiff would have no right to resist its execution, and accordingly such a relief is not one merely for obtaining a declaratory decree but is for obtaining a more substantive relief, which is not specifically provided for in the Court Fees Act and would accordingly fall under article 1 of the first schedule. It cannot be denied that there is something to be said for such a view, because in substance the object of the plaintiff is to frustrate a decree which has been passed against him and to nullify it and to get it out of his way. On the other hand, the Court Fees Act is a fiscal measure and is to be construed strictly and in favour of the subject. There is also no doubt that there is a long course of decisions in this Court in which it has been laid down consistently, and over and over again, that where nothing more than a mere declaration is sought for, the suit is one for obtaining a declaratory decree and no *ad valorem* court fee for such a relief can be charged. We may in this connection refer only to the recent cases of this Court in *Radha Krishna* v. *Ram Narain* (1), *Brij Gopal* v. *Suraj Karan* (2), *Lakshmi Narain Rai* v. *Dip Narain Rai* (3) and *Mohammad Ismail* v. *Liyaqat Husain* (4). We accordingly think that on the principle of *stare decisis*, if nothing else, this course of decisions should not now be disturbed.

We accordingly hold that inasmuch as the plaintiff in this case merely asked for a declaration that the previous decree was not in any way binding upon him and was altogether void and ineffectual, his suit was one for obtaining a declaratory decree only and falls under article 17(iii) of the second schedule.

(1) (1931) I. L. R., 53 All., 552.
(2) [1932] A. L. J., 466.
(3) (1932) I. L. R., 55 All., 274.
(4) [1932] A. L. J., 165.

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The learned advocate for the respondents has further urged that inasmuch as the plaintiff added relief (*b*) which was to the effect that in addition to relief (*a*) any other relief which may, in the opinion of the court, be just may also be granted to the plaintiff against the defendants, he must be deemed to have claimed more than a mere declaratory decree. But such a relief is unnecessarily added in most plaints and is not intended to mean anything more than reminding the court of its power to grant other reliefs even though not specifically asked for. As the words are too vague and indefinite, and no specific and definite relief is referred to therein, we cannot regard it as one which requires the demand of additional court fee nor do we consider that coupled with the declaratory relief it changes the nature of the relief claimed.

Our answer to the question referred to us is in the affirmative.

REVISIONAL CRIMINAL

1933
April, 27

Before Mr. Justice Bennet and Mr. Justice Bajpai
EMPEROR *v.* RUDRA DATT BHATT*

District Boards Act (Local Act X of 1922), *sections* 34, 182—*Indian Penal Code, section* 168—*Member of District Board engaging in trade on contracts by the Board—Sanction to prosecute—Criminal Procedure Code, section* 197—*Whether complaint by District Board necessary.*

A member of a District Board, without obtaining the permission of the Commissioner, entered into contracts, in another person's name, given on behalf of the Board by its Education Committee for the supply of coir matting and carried on that business for about two years. The Local Government sanctioned, under section 197 of the Criminal Procedure Code, his prosecution under section 168 of the Indian Penal Code read with section 34 of the District Boards Act. This sanction was conveyed in a letter addressed to the

*Criminal Revision No. 563 of 1932, from an order of A. Hamilton, Sessions Judge of Kumaun, dated the 25th of July, 1932.

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Deputy Commissioner, and the complaint was filed in court by the Assistant Inspector of Schools, according to the direction of the Deputy Commissioner.

Held that it was not necessary that the Deputy Commissioner should have himself filed the complaint because the letter of sanction was addressed to him. There is no provision in section 197 of the Criminal Procedure Code for a sanction to be addressed to any particular officer. A sanction is an order directing the prosecution of a certain person, and in the ordinary way that order is conveyed to the authorities who are responsible for initiating prosecutions in the locality in question.

Held, also, that it was not necessary that there should have been a complaint by or on behalf of the Board in accordance with section 182 of the District Boards Act. That section refers only to offences which are punishable under the said Act or under any rule or bye-law; and the offence in question, though arising under section 34 of the District Boards Act, was not punishable under that section, which prescribed no penalty; on the contrary it was punishable under section 168 of the Indian Penal Code.

Held, further, that the exemption contained in section 34(2), clause (*f*) of the District Boards Act refers to occasional sales of single articles, as distinct from contracts for the supply of large quantities of any material, and was inapplicable to the present case.

Dr. *K. N. Katju* and Messrs. *P. L. Banerji* and *Banke Behari*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*) for the Crown.

BENNET and BAJPAI, JJ. :—This is an application in revision on behalf of one Pandit Rudra Datt Bhatt who has been convicted under section 168 of the Indian Penal Code read with section 34 of the District Boards Act and sentenced to four months' simple imprisonment and a fine of Rs.1,000 or three months' simple imprisonment in default of payment. The charge framed against the accused was that being a member of the District Board of Almora from November, 1928, to November, 1930, he carried on during this period the business of supplying

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coir matting to the said District Board in the name of Gangaram Kishorimohan, thus engaging in trade without the permission of the Commissioner, contrary to section 34(1) of the District Boards Act and thereby committed an offence punishable under section 168 of the Indian Penal Code. The conviction and sentence of the Magistrate was upheld on appeal by the learned Sessions Judge. The finding of the sessions court is that there was "a carefully worked out scheme to get something like a 100 per cent. profit from the Board while the appellant was a member of it" and that "in one year the District Board paid Rs.1,005 and for matting the price came to a little under Rs.950. The price of the matting with freight as entered in the ledger of the accused came to about half that amount." The points in regard to the facts were not pressed before us and we consider that the facts found are correct. The arguments which have been addressed to us are arguments on points of law. In the first place it was argued that the sanction in this case was not sufficient and that the prosecution had not been properly initiated. There was a letter of sanction from the Local Government stating that Government gave sanction under section 197 of the Code of Criminal Procedure to the prosecution of the accused under section 168 of the Indian Penal Code read with section 34 of the District Boards Act and that the accused was formerly a member of the Almora District Board. The Local Government further directed that the trial should be held in the court of Rai Sahib Pandit Gokaran Nath Ugra, Deputy Collector of Almora. This sanction was conveyed in a letter addressed to the Deputy Commissioner of Almora and the Deputy Commissioner apparently had an inquiry made by the Tahsildar and a complaint was filed in the court by the Assistant Inspector of Schools, Kumaun. An argument was addressed to us that the sanction was addressed to the Deputy Commissioner and he should have filed the complaint. There is no provision in section 197 of the

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Code of Criminal Procedure for a sanction to be addressed to any particular officer. A sanction is an order directing the prosecution of a certain person, and in the ordinary way that order is conveyed to the authorities who are responsible for initiating prosecutions in the locality in question. That was what was done in the present case and we do not see that there was anything irregular in the procedure. The sanction was given in the present case because when the accused was a member of the District Board he was not removable from his office without the consent of the Local Government.

A further argument was addressed to us. Under section 182 of the District Boards Act of 1922 the following provision is made: "Unless otherwise expressly provided, no court shall take cognizance of any of the offences punishable under this Act or under any rule or bye-law, except on the complaint of, or upon information received from, the Board or some person authorised by the Board by general or special order in this behalf." The argument for the applicant was that the present prosecution should have been started under this section on a complaint of the Board or some person authorised by the Board and that this has not been done. But the section refers to "offences punishable under this Act or under any rule or bye-law". The present offence is not an offence which falls within this description. It was argued that the present offence was one under section 34 of the District Boards Act. That may be so, but it is not punishable under section 34; on the contrary it is punishable under section 168 of the Indian Penal Code. Section 34, sub-section (1) runs as follows: "A member of the Board who, otherwise than with the permission in writing of the Commissioner, knowingly acquires, or continues to have directly or indirectly by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the Board shall be deemed to have committed

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an offence under section 168 of the Indian Penal Code." There is no penalty prescribed in section 34 itself, and to ascertain a penalty we have to look to section 168 of the Indian Penal Code. Learned counsel argued that because reference was made to section 168 of the Indian Penal Code, therefore that section was incorporated into section 34 of the District Boards Act. He referred to a ruling of their Lordships of the Privy Council in *Secretary of State for India* v. *Hindusthan Co-operative Insurance Society* (1). That ruling was on a point which is different from the point before us and the ruling merely laid down that where a statute is incorporated by a reference into a second statute the repeal of the first statute does not affect the second. We think therefore that the ruling cannot be applied in the further extended meaning which learned counsel desires. If section 182 had been intended to cover the present case it would have referred to "offences punishable under this Act or any Act referred to in this Act or under any rule or bye-law". As the wording of section 182 is different and does not purport to deal with offences referred to in the Act we consider that section 182 has no application to the present case.

An argument was next made as to whether this was a contract given by the Board or not. The contracts in question were given by the Education Committee of the Board under the provisions of sections 63A and 65A of the District Boards Act which empower the Education Committee to give contracts for educational purposes, but the wording in section 34 is not merely a contract by the Board but a contract by or on behalf of the Board. We consider that a contract given in accordance with the Act by the Educational Committee is a contract given on behalf of the Board. We may also refer to the definition of "Board" in section 3 of the Act where it is stated that "Board" includes, in any case where a power is expressed as being conferred or a duty as being imposed

(1) (1931) I. L. R., 59 Cal., 55.

on a Board, a committee appointed by a Board. It was further argued that the contracts were given by the Educational Committee and that accused was not a member of the Educational Committee and therefore it was said he would not be guilty of the offence under section 34; but section 34, sub-section (1) refers in general terms to "a member of the Board" and is not limited to members of particular committees.

The next argument addressed to us was that the accused would be exempted under section 34(2)(*f*) which states that the section does not apply to a person "having a share or interest in the occasional sale to the Board of an article, in which he regularly trades, up to a value not exceeding, in any one year, such amount as the Board with the sanction of the Local Government fixes in this behalf". It is not shown that any amount has been fixed under this sub-section. We consider that the sub-section refers to occasional sales of single articles as distinct from contracts. In the present case the accused entered into contracts for the supply of thousands of yards of coir matting. Such contracts cannot be considered to be occasional sale of single articles. The exemption therefore does not apply. Some argument was made in regard to an alleged irregularity in the signature of one contract and it was said that exhibit 25 was signed by the Chairman of the Educational Committee instead of by the Secretary as prescribed by section 65A(4). This document, exhibit 25, does not appear to be a contract but an order by the Chairman directing the purchase of certain articles including matting. No irregularity is shown. If there was any such irregularity it does not appear to us that it would have any bearing on the guilt of the accused.

We consider that the conviction of the accused under section 34 of the District Boards Act read with section 168 of the Indian Penal Code is correct. On the question of sentence we consider that this is not a case

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in which any further period of imprisonment should be undergone and accordingly we reduce the period of imprisonment to the period already undergone, which is only a few days, and we maintain the sentence of fine of Rs.1,000 or three months' simple imprisonment in default. We do not consider the fine excessive in view of the illegal profit which the accused is found to have made.

MISCELLANEOUS CIVIL

1933
April 28

Before Mr. Justice Niamat-ullah and Mr. Justice Bennet
IN THE MATTER OF PALLUMAL BHOLANATH*

Income-tax Act (XI of 1922), *sections* 22(4), 23(4), 30(1) *proviso*, 31—*Notice to produce account books—Whether such notice can be issued after the assessee has made a return—Appeal from assessment made under section* 23(4) *—Assistant Commissioner examining the record to satisfy himself that section* 23(4) *was applicable—Whether amounts to entertaining and deciding the appeal.*

It is open to an Income-tax Officer to issue a notice under section 22(4) of the Income-tax Act at any time after he has called upon the assessee to furnish a return, and even after a return has been furnished by the assessee. The failure of the assessee to comply with such a notice renders him liable to be assessed under section 23(4) of the Act.

In an appeal filed against an assessment made under section 23(4) the Assistant Commissioner is justified in so far examining the record as to satisfy himself whether the Income-tax Officer was right in proceeding to make an assessment under section 23(4), and, on being so satisfied, in rejecting the appeal on the ground that no appeal lay, according to the proviso to section 30(1) of the Act. Such procedure on the part of the Assistant Commissioner does not virtually amount to an order dismissing an appeal under section 31, and therefore the assessee has no right to approach the Commissioner to state a case.

Mr. *Gopi Nath Kunzru*, for the appellant.

Mr. *Kamalakanta Verma*, for the Crown.

*Miscellaneous Case No. 41 of 1931.

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NIAMAT-ULLAH, J. :—This is a reference under section 66(3) of the Income-tax Act. The Income-tax Commissioner was required, by an order of a Bench of this Court, dated the 20th of July, 1931, to state a case in relation to three questions therein formulated. The case has since been stated. The only facts which it is necessary to state for the purposes of the reference before us are these :

The assessee, Sita Ram, was required by the Income-tax Officer to furnish a return, which he did. Subsequently the Income-tax Officer issued, what purports to be, a notice under section 22(4) of the Income-tax Act, calling upon Sita Ram to produce his account books for the years 1983 to 1985 Sambat. Sita Ram produced his account books for the years 1984 and 1985 but not those for 1983. On being questioned by the Income-tax Officer on a later date as regards the circumstances in which he failed to produce the accounts for the year 1983 Sambat, he explained that the same had been filed in the court of the Munsif, Benares. The Income-tax Officer sent a communication to the Munsif asking whether the assessee's account books for the year 1983 Sambat had been filed in his court, as alleged by the assessee. The Munsif replied in the negative. Subsequently two other notices under section 22(4) were issued to the assessee. It is not necessary to enter into the details of those notices. The Income-tax Officer was of opinion that the assessee failed to comply with these later notices as well. Accordingly the Income-tax Officer made an assessment to the best of his judgment under section 23(4) of the Income-tax Act. The significance of an assessment under section 23(4) is that no appeal is permitted, and the Income-tax Officer's assessment is final, subject to the general revisional jurisdiction of the Commissioner under section 33 of the Income-tax Act. I may, however, mention that the assessee is not altogether without a remedy where an Income-tax Officer makes an assessment under section 23(4) on the ground that the assessee failed

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to comply with a notice issued under section 22(4), because he can apply, under section 27, for the annulment of the assessment on sufficient cause being shown and for a fresh assessment being made. In case of an improper refusal by the Income-tax Officer, the law allows an appeal to the Assistant Commissioner under section 30 of the Income-tax Act. It appears that the assessee in the present case actually took action under section 27 of the Act, but without success. He also preferred an appeal to the Assistant Commissioner, but I am informed that it was abandoned. It is not necessary to pursue this aspect of the case any further.

On the assessment being made by the Income-tax Officer under section 23(4) of the Income-tax Act, the assessee preferred an appeal to the Assistant Commissioner, who, after examination of the record, expressed the opinion that as the Income-tax Officer had made the assessment to the best of his judgment under section 23(4) no appeal lay. The assessee moved the Income-tax Commissioner to state a case for reference to the High Court, and on this request being refused the assessee successfully moved this Court for an order requiring the Income-tax Commissioner to state a case in reference to the three questions which we are now called upon to decide. These questions are as follows :

(1) Whether the Assistant Commissioner was right in professing not to admit the appeal, when he partially entered into the merits of the appeal and saw whether the Income-tax Officer was right or not in making an assessment to the best of his judgment?

(2) Whether the order of the Assistant Commissioner virtually amounted or not to an order dismissing an appeal under section 31, and whether or not, therefore, the assessee had a right to approach the Commissioner to state a case?

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(3) Whether, in the circumstances of the case, it was open to the Income-tax Officer to issue a notice under section 22, clause (4) of the Income-tax Act, and whether on account of a non-compliance with that order an assessment to the best of the judgment of the Income-tax Officer could be made?

I prefer to deal with the last question first. The learned advocate for the assessee has pointed out that all the notices purporting to be those under section 22(4), issued by the Income-tax Officer in this case, were issued after the assessee submitted his return under section 22(2). His contention is that the Income-tax Officer cannot issue a notice under section 22(4) after the assessee submits his return and that it is only after the assessee has been called upon to furnish a return and before he has actually furnished a return that the Income-tax Officer can issue a notice under section 22(4). At one time there was some difference of opinion on this question. I had to deal with this point in *In the matter of Lachhman Prasad Babu Ram* (1). MUKERJI, J., took a different view, and the matter was referred to a Full Bench; but unfortunately the reference proved to be infructuous. The view which I expressed on that occasion is wholly against the contention which is now put forward by the learned advocate for the assessee. I have carefully considered sections 22 and 23 of the Act in the light of the arguments addressed to me today and I see no reason to depart from the view which I then expressed. I understand that my learned brother is also inclined to take the same view. The decision of a Division Bench of the Punjab High Court was strongly relied on when the case already referred to was argued in this Court. The decisions of this Court and of the Calcutta and Patna High Courts were against the Punjab case. The Lahore High Court has since had the occasion to reconsider the question in *Muhammad Hayat*

(1) [1930] A. L. J., 1.

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Haji Muhammad Sardar v. *Commissioner of Income-tax* (1) and has taken the same view as had been taken by other High Courts. There is thus a unanimity of opinion on the question raised by the learned advocate for the assessee. I hold that it is open to an Income-tax Officer to issue a notice under section 22(4) at any time after he has called upon the assessee to furnish a return. This being so, the failure of the assessee to comply with the first notice issued by the Income-tax Officer calling upon him to produce the account books for the year 1982 Sambat rendered him liable to be assessed under section 23(4). In this view, I answer both parts of the third question in the affirmative.

As regards the first question, I think the Assistant Commissioner was right in so far examining the case as to satisfy himself whether the appeal before him was competent. Without examining the record to some extent he could not have been in a position to find whether the assessment was under section 23(4) and whether an appeal lay. Accordingly I answer the first question also in the affirmative. It follows from what I have said in answering the first question that the second question must be answered in the negative. Accordingly I answer it in the negative.

BENNET, J. :—I agree with the observations which have fallen from the lips of my learned brother and I desire to add a few words on my own account on one of the points which have been raised and which is the main point in this case, that is, whether the issue of a notice under section 22(4) of the Income-tax Act, after the filing of the return under section 22(2), was *ultra vires* or not. On this I would make the following comments :

(1) *Argument from grammar.* Section 23(4) deals with three clauses. The first clause is failure to make a return. The second clause is failure to produce accounts or documents required by the Income-tax Officer. The

(1) (1930) I. L. R., 12 Lah., 129.

third clause is failure to attend or produce evidence. Now these three clauses are separated by the disjunctive conjunction "or". The middle clause is not connected with the other clauses, but is separated from them by these two disjunctive conjunctions "or, or". I consider, therefore, that words cannot be imported into the middle clause from the other clauses and that the middle clause as it stands is complete in what it expresses. The learned advocate for the assessee desires to add to the middle clause the words "before he has made a return". I consider that, under the ordinary rules of English grammar, these words cannot be imported into the middle clause. The reason which the learned counsel gives for desiring to import these words is that the last clause begins with the words "or having made a return . . ." The mere fact that the last clause uses these words is not a reason for importing the negative into the second clause.

(2) *Argument from logic.* The second argument I would call the argument from logic. In my opinion it would be illogical to impose the penalty of assessment under section 23(4), against which there is no appeal, for the non-production of accounts or documents when the order of the Income-tax Officer was issued before the return was filed, and hold that the penalty could not be imposed if the order was made after the return was filed. There is no reason whatever to distinguish these two cases. The failure in the one case is equally worthy of penalty with the failure in the other case. To draw a distinction between the two cases will be illogical, and it is incorrect to interpret an Act in an illogical manner if it can be interpreted in a logical manner.

(3) The third point is that if the argument for the assessee were accepted, there would be no penalty provided for the failure of the assessee to produce accounts or documents required by the Income-tax Officer if the order was made after the return was filed. The learned counsel for the assessee referred to section 37; but that section really

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provides for the production of evidence from any person and not specially from the assessee, and, therefore, we cannot look to that section for a penalty for the assessee's non-production of accounts or documents.

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(4) The fourth argument is from the course of business. It is natural for the Income-tax Officer to take up a case of an assessee when his return is furnished, and the Income-tax Officer then sees what books or documents are required, and he issues a notice on the assessee to produce his books or documents. Such will be a natural course of procedure in assessment. Further, sub-section 22(4) itself provides that the notice is to issue to a person upon whom a notice has been served under sub-section (2). It is, in my opinion, absurd to suggest that the time during which the Income-tax Officer could issue a notice under section 22(4) is limited to the time between the service of a notice on an assessee under section 22(2) and the return furnished by the assessee in compliance with that notice.

For these reasons I agree with the view expressed by my learned brother, and I answer the questions as he has answered them.

Before Mr. Justice Young

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April, 28

IN THE MATTER OF UNION INDIAN SUGAR MILLS CO., LTD., BILAS RAI MANGAL CHAND (PETITIONER)*

Company—Lien on shares for debts due to company—Mortgage of shares—Managing Director mortgaging his shares—Notice—Mortgagee of shares not notifying company or getting himself registered as shareholder—Managing Director's knowledge whether notice to company—Principal and agent—Notice to agent.

Where a company has a lien upon the shares of its members for debts owing by the members to itself, if a member pledges his shares to some third party as security for a loan,

*Application in Miscellaneous Case No. 36 of 1926.

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and the company has notice of the transaction, the company loses its lien for all debts owing by that member to the company subsequent to the knowledge of the company of the transaction.

Where the Managing Director of a company had peculiar and extensive powers given to him by the articles of association, so that he had the powers of the whole Board of Directors delegated to him, it was *held* that his knowledge of a transaction of pledge of shares was equivalent to the knowledge of the company. Further, he was in the position of agent of the company, and under the ordinary law of principal and agent notice to an agent was notice to the principal. So, when this Managing Director pledged his shares with his creditor, by handing over the share certificates together with a blank transfer, and the creditor neither notified the transaction to the company officially nor got himself registered as a shareholder, it was *held* that in the circumstances of this case the company had notice of the transaction.

Mr. *A. Sanyal*, for the petitioner.

Mr. *S. Abu Ali*, Official Liquidator, for the company.

YOUNG, J. :—The liquidator of the Union Indian Sugar Mills Co., Ltd. (in liquidation) has at his disposal a surplus after paying all the creditors of the company. It, therefore, became his duty to divide this *pro rata* among the shareholders. He naturally proposed to divide this money among those shareholders whose names appear upon the register of shareholders. The five applicants before me today, however, are not registered shareholders. They claim to hold the shares of one Lala Debi Datt as security for loans advanced to him. As security for those loans they took the share certificates and blank transfers. These transactions took place some time before the company went into liquidation. The mortgagees of the shares never took any steps to notify the company officially or to have their names registered as shareholders. They claim, however, that as Lala Debi Datt was the Managing Director of the company and as he himself personally pledged these shares to them, the company

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must therefore be said to have had notice of the pledging of the shares, and that thereafter the company had no lien upon the shares in question. The liquidator claims that Lala Debi Datt was indebted to the company for a large sum of money; that under the articles of association the company has a lien upon all the shares of members for debts owing by the members to the company, and that therefore that share of the surplus which would be due to Lala Debi Datt should not be distributed to the mortgagees of the shares, but should be distributed among the other shareholders.

The law upon this point is clear. A company has a lien upon the shares of its members for debts owing by the members to itself. If, however, a member pledges his shares to some third party as security for a loan, and the company has notice of the transaction, the company loses its lien for all debts owing by that member to the company subsequent to the knowledge of the company of the transaction. The question therefore arises in this case whether the knowledge of Debi Datt of the transaction of the pledging of these shares was the knowledge of the company. If it was, then only that amount of the debt owing by Debi Datt to the company before the pledging of the shares would be distributable among the other shareholders. On the other hand, if the knowledge of Debi Datt was not the knowledge of the company, then the whole amount which would go ordinarily to the applicants would be distributable among the other shareholders.

It is necessary to see in this case who Debi Datt was. It appears that Debi Datt was clearly the most important man in this company. He was the Managing Director, and under article 90 of the articles of association it was provided that "Lala Debi Datt shall be the permanent Managing Director of the company under these articles, until such time as the said Lala Debi Datt resigns the

office of his own accord; he shall have all powers exercisable by the Directors of the company, either in management of the affairs of the company or in raising or borrowing any sum or sums of money for the purpose of the company, and he shall not be subject to retirement either by rotation or otherwise."

It will thus be seen that peculiar and extensive powers were given to Lala Debi Datt by the articles of association. He was by no means an ordinary Managing Director. Further, there is no doubt that he had knowledge of his own transaction in pledging the shares. Under circumstances somewhat similar to these this point of law has been considered in England in *Rainford* v. *James Keith & Blackman Co., Ltd.* (1). It was there held that where three Directors had notice of a charge upon shares in their private or personal capacity, that was good notice to the company. Debi Datt in this case had the powers of the whole Board delegated to him and therefore this authority is applicable. In my opinion, the proposition might also be stated under the ordinary law of principal and agent. Notice to an agent is undoubtedly notice to the principal, and therefore notice to the company's agent would be notice to the company itself. The only exception to this rule would be when the agent is acting in fraud of his principal. Now in this case there is no doubt that Lala Debi Datt in his peculiar position must be held to be the agent of the company. There is equally no doubt that he had notice of the transaction in question. It must, therefore, be held that the company too had notice. This being the case, the lien of the company upon the shares of Lala Debi Datt for any debt due to the company by Lala Debi Datt goes after the date of knowledge of the charge upon the shares. The result will be that such money as Lala Debi Datt owed to the company in each case before the company had knowledge of the particular charge will be divided by the

(1) [1905] 2 Ch., 147.

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liquidator among the shareholders other than the shareholder who holds that particular charge upon the shares, provided the money owing to the company has not subsequently been paid by Lala Debi Datt. The mortgagees of these shares propose to apply to the court to have their names registered as the shareholders of the shares that are charged to them in place of Lala Debi Datt's name. When that is done and the court has ordered accordingly, the liquidator will pay to these shareholders their *pro rata* share of the surplus.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

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May, 2

MOTI LAL (PLAINTIFF) *v.* RADHEY LAL AND OTHERS (DEFENDANTS)*

Transfer of Property Act (IV of 1882), *section* 6(*e*)—*Mere right to sue—Assignment of right to damages on breach of contract—Transfer of Property Act (IV of* 1882), *section* 3—*Actionable claim—Right to recover unliquidated damages is not an actionable claim—Limitation Act (IX of* 1908), *articles* 62, 89.

An actionable claim means a claim to a debt, which, in its primary sense, is a liquidated money obligation, and it is an essential feature of an action for debt that it should be for a liquidated or a certain sum of money. According to the definition of an actionable claim, as contained in section 3 of the Transfer of Property Act, the right to recover an unascertained amount of damages resulting from a breach of contract is not an actionable claim but a mere right to sue, which cannot be transferred because of the provisions of section 6(*e*) of the Transfer of Property Act.

Article 62 of the Limitation Act can apply only to cases where a definite sum of money had been received by the defendant and which he was to hold for the use of the plaintiff. Article 89, and not article 62, applies to a suit for accounts

* First Appeal No. 126 of 1929, from a decree of Makhan Lal, Subordinate Judge of Moradabad, dated the 28th of January, 1929.

between a principal and his commission agent in respect of transactions conducted by the latter on behalf of the former.

Dr. *K. N. Katju* and Messrs. *S. B. L. Gaur* and *R. K. S. Toshniwal*, for the appellant.

Messrs. *K. Varma* and *Ambika Prasad Dube*, for the respondents.

RACHHPAL SINGH, J. :—This is a plaintiff's appeal arising out of a suit for rendition of accounts. The defendants 2nd party, a firm styled Mithu Lal Gopal Dass, purchased 1,153 bags of wheat, 9 bags of *arhar* and 4 bags of gram on different dates between 14th June and 9th July, 1924, through the agency of the defendants 1st party, a firm styled Gobind Ram Brij Lal and carrying on business as commission agents. These goods were sold by the firm of Mithu Lal. The trial court has found that in respect of this transaction a sum of Rs.1,771-13-6 remained due to the firm of Mithu Lal Gopal Dass from the firm Gobind Ram Brij Lal. This finding of the learned Subordinate Judge has been accepted by both the parties in this Court.

Between the 5th of July and the 15th of September, 1924, the firm of Mithu Lal purchased 887 bags of wheat on various dates through the agency of the firm of Gobind Ram Brij Lal. The dispute between the parties is mainly confined to this second transaction.

Moti Lal, plaintiff in the case, is an assignee of the interest of the firm of Mithu Lal Gopal Dass under a deed of assignment dated the 1st of February, 1928. The plaintiff's case was that on the 19th of February, 1925, the firm of Mithu Lal Gopal Dass sent telegraphic instructions to the firm of Gobind Ram Brij Lal directing them to sell the 887 bags of wheat. These instructions were not complied with. On the other hand, the firm of Gobind Ram Brij Lal wrongly asserted that the goods had already been sent to Calcutta and sold there under the instructions of the firm of Mithu Lal. The plaintiff sued to recover the following items :—(1) Rs.1,800 on

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account of the first transaction; (2) Rs.2,100 on account of the second transaction, relating to 887 bags of wheat; the plaintiff calculated his profits with reference to the rate at which wheat was sold in Sambhal town on the 19th of February, 1925, the date on which the firm of Mithu Lal had given instructions for the sale of 887 bags to the firm of Gobind Ram by wire; (3) Rs.75 on account of the price of 9 bags of *arhar;* (4) Rs.40-10-0 on account of the price of 4 bags of gram; (5) Rs.1,075 by way of interest at 12 annas per cent. per mensem: Total Rs.5,090-10-0.

The claim was resisted by the firm of Gobind Ram Brij Lal. * * * * The contesting defendants asserted that accounts were explained to the firm of Mithu Lal and that only a sum of Rs.356-1-3 was due, that the plaintiff had purchased a mere right to sue which was not transferable under the provisions of section 6 of the Transfer of Property Act and so the plaintiff was not entitled to maintain the suit and that the suit was not within limitation.

[The judgment then dealt with the facts and came to the following conclusion.] So, the contesting defendants are liable to account to the plaintiff for the price of 28 bags of wheat in addition to the sum of Rs.356-1-3 admitted to be due.

The next question for consideration in this case is whether the plaintiff, an assignee of the firm of Mithu Lal Gopal Dass, has a right to sue. The contention raised by the contesting defendants is that the plaintiff has purchased a bare right to sue which could not be transferred in view of the provisions of section 6, clause (*e*) of the Transfer of Property Act and so he is not competent to maintain the suit. The plaintiff contended that what had been assigned to him by his assignors was a debt due to them from their agents on account of transactions of sales and purchases, and, as such, it was an actionable claim which could be transferred. The learned Subordinate Judge accepted the contention of the

defendants and dismissed the suit. Before dealing with the legal aspect of the question, it is necessary to look into the terms of the deed of assignment in order to see what the subject-matter of the assignment was. The deed of assignment recites that the assignors were assigning their right to the profits in the second transaction and in the accounts and advance of the first transaction. The claim of the assignors, as against the contesting defendants, is valued in the deed at Rs.5,100 and the sale of the claim is made in favour of the plaintiff for a sum of Rs.3,000. It is stated in the deed that the assignors several times asked the contesting defendants to render an account but this demand was not acceded to. After a perusal of the deed I am of opinion that so far as the assignment of the right of the assignors in respect of the first transaction is concerned the plaintiff is entitled to maintain the suit. The assignors had purchased some grain through the contesting defendants. They also deposited some cover money with the defendants. The grain was sold. The sale money was deposited with the defendants. The assignors were entitled to recover from the contesting defendants an ascertained amount. The assignors assigned to the plaintiff an actionable claim or in other words a debt, which they were quite competent to do.

As regards the assignment of the assignors' right in respect of the second transaction, the case stands on a different footing altogether. Some time after the first transaction, the firm of Mithu Lal Gopal Dass purchased more wheat (887 bags) through the agency of the contesting defendants. At the time of the assignment under which the plaintiff comes to court, the assignors asserted that the commission agents had wrongfully sold these bags without their authority. The assignors believed that on taking accounts a sum of money would be found due to them. In paragraph 16 of the plaint it is stated : "The defendants first party were repeatedly asked to render an account, and to pay the remaining

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amount due to the defendants second party, of which the plaintiff is the owner by virtue of the sale deed, after deducting the amount of commission expenses, etc. But they did not render the account at all . . . " It appears that so far as the second transaction is concerned, what the plaintiff purchased was "a right to sue for damages after settlement of account". It is true that in the sale deed the assignors have given an estimated value of their claim. But that fact, by itself, cannot convert a mere right to sue into an actionable claim. In substance the sale was of a right to sue for damages which might be found due in case the allegations of the plaintiff about the alleged breach of contract were true. Under the Transfer of Property Act an actionable claim can be transferred. An actionable claim means a claim to a debt. In its primary sense a debt is a liquidated money obligation, and it is an essential feature of an action for debt that it should be for a liquidated or a certain sum of money. I apprehend that a right to recover an uncertain amount cannot be said to be a debt. In the case before us, the deed of assignment and the frame of the suit go to show that what the plaintiff claims is, so far as the second transaction is concerned, damages, unascertained at the time of the institution of the suit, resulting from a breach of contract on the part of the contesting defendants. The question as to whether or no the plaintiff was entitled to recover any damages depended on his allegation that the contesting defendants had sold the goods without getting the instructions of the assignors. Till the establishment of that point in the plaintiff's favour, it could not be known as to whether any damages were due to him at all. So, it cannot be said that what was sold to the plaintiff under the assignment was an actionable claim as defined in section 3 of the Transfer of Property Act.

The next point that arises for consideration is whether the transfer of a right to sue to recover unascertained damages for a breach of contract offends against

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the provisions of section 6, clause (*e*) of the Transfer of Property Act. Clause (*e*) of section 6 of the Transfer of Property Act lays down that a mere right to sue cannot be transferred. The contention raised by the learned counsel for the appellant is that a right to recover damages arising out of a breach of contract is capable of a valid transfer and does not offend against the provisions of section 6, clause (*e*) of the Transfer of Property Act. In support of his contention the learned counsel for the appellant has cited some rulings. The first ruling relied upon by him is *Churamoni Mondal* v. *Rajendra Kumar* (1). It is a Calcutta case. It was laid down in it that "The right to recover money, which might be found due on taking accounts from an agent, is not a mere right to sue within the meaning of section 6, clause (*e*) of the Transfer of Property Act, but is an actionable claim which is capable of transfer; and the transferee can maintain a suit in his own name against the agent for the recovery of such amount as might be found due on taking accounts from him." There can be no doubt that the view taken in this ruling supports the contention of the learned counsel for the plaintiff appellant. The next case on which the appellant relies is *Nagappa Pandyappa* v. *Badridas Shrikishan* (2). A careful perusal of this case would show that as a matter of fact it does not support the contention of the appellant. Rather, it goes against him. At page 410 we find the following observations: "So, on the uncontradicted evidence before the Judge, I think, he was entitled to find that in fact the amounts were ascertained and a sum was arrived at between the parties. That being so, that to my mind would mean, apart from any authority, that there was here an ascertained sum due from the defendants to the plaintiff, in other words, a debt." Dealing with the view taken in a Calcutta case, *Abu Mahomed* v. *S. C. Chunder* (3), the learned Judge made the following

(1) (1917) 42 Indian Cases, 390. (2) A.I.R., 1930 Bom., 409.
(3) (1909) I.L.R., 36 Cal., 345.

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observations: "This was held to be merely a claim for unliquidated damages for breach of contract, and, therefore, not assignable. There, to prove the claim, the market price at the date of the breach would have to be ascertained and this might involve calling several witnesses." From these observations it would be clear that the learned Judge who decided that case was of opinion that a claim for unliquidated damages could not be assigned. Having regard to the facts of the particular case before him, he arrived at the conclusion that it was a case in which the plaintiff had assigned a debt already due. It must, therefore, be held that this ruling is no authority for the contention put forward on behalf of the appellant. Reliance was placed on *Jagat Chunder Roy* v. *Iswar Chunder Roy* (1). But, in my opinion, that case has no bearing on the point in issue. What was decided in that case was that the share of a partner in a partnership business was saleable property within the meaning of those words in section 266 of the Code of Civil Procedure, and could be attached and sold in execution of a decree against that partner. The next case relied upon by the learned counsel for the appellant is *Madho Das* v. *Ramji Patak* (2). In that case it was held that "Where money is due by an agent or vendee to his principal or vendor, the principal's or vendor's claim against his agent or vendee may be attached and sold in execution of a decree against the principal or vendor as a debt under section 266 of the Code of Civil Procedure, and it is not necessary that the exact amount due to the principal or vendor should be ascertained prior to attachment and sale." In the course of the judgment the learned Judges who decided that case made the following observations: "What was attached here was, in our opinion, a debt; although the amount of the debt was unascertained, it was capable of being ascertained, and as such debt it was attachable under section 266 of the Code of Civil Procedure; it was not a mere right to sue for

(1) (1893) I.L.R., 20 Cal., 693. (2) (1894) I.L.R., 16 All., 286.

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damages which would have been excluded from attachment by the proviso to that section." In my opinion, that ruling is not applicable to the case before us. That was not a case in which the claim was to recover unascertained damages on a breach of contract. It may also be pointed out that at the time when that case was decided, the law on the point was somewhat different. According to the repealed section 130 of the Transfer of Property Act, for which the present definition in section 3 was substituted by the Amendment Act No. II of 1900, section 2, any claim which could be recognized by the courts as affording grounds for relief was an actionable claim. It appears to me that according to the definition of an actionable claim, as given in section 3 of the Transfer of Property Act now, the right to damages accruing after the occurrence of a breach is not an actionable claim but a mere right to sue. Before the Amendment Act II of 1900, clause (*e*) of section 6 of the Transfer of Property Act laid down that a mere right to sue "for compensation for a fraud or for harm illegally caused" could not be transferred. After the amendment of 1900, clause (*e*) of section 6 of the Transfer of Property Act is differently worded. The clause, as it now stands, prohibits the transfer of a mere right to sue.

Now, let us turn to the rulings cited on behalf of the respondent. The leading case on the point, on which reliance has been placed, is *Abu Mahomed* v. *S. C. Chunder* (1) in which it was held that a claim for damages for breach of contract, after breach, was not an actionable claim within the meaning of section 3 of the Transfer of Property Act and therefore could not be transferred. The next case relied on is *Jewan Ram* v. *Ratan Chand Kishen Chand* (2). In this case, the learned Judges held that there was authority both English and Indian for the view that a claim to unliquidated damages for breach of contract was not assignable. At one place in the judgment at page 503, we find

(1) (1909) I.L.R., 36 Cal., 345. (2) (1921) 70 Indian Cases, 498.

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the following observations: "Moreover, when an ordinary commercial contract for sale of goods has been broken and subsists only for the purpose of enforcing a claim to damages, it is to my mind difficult to say that the right to damages is, standing by itself, anything more than a mere right to sue, a right which is not incidental to property but is incidental to abstract right in respect of contracts comparable to the abstract rights to personal safety and immunity from fraud in the region of tort." The next case relied on is *Khetra Mohan Das* v. *Biswa Nath Bera* (1). A Bench of two learned Judges of the Calcutta High Court decided that a right to take accounts and to recover such sums as may be due was not assignable, being a mere right to sue within the meaning of section 6, clause (*e*) of the Transfer of Property Act. The same view was taken by the Bombay High Court in the case of *Hirachand Amichand* v. *Nemchand Fulchand* (2) and by the Punjab Chief Court in *Jangli Mal* v. *Pioneer Flour Mills* (3).

On a review of the authorities cited before us I am of opinion that the correct view is that a claim for unliquidated damages for breach of contract, after the breach, is not an "actionable claim" within the meaning of section 3 of the Transfer of Property Act and cannot be transferred because of the provisions of clause (*e*), section 6 of the Transfer of Property Act. For the reasons given above I hold that the deed of assignment, so far as it relates to the transfer of the assignors' right in respect of the first transaction, is good and valid. It is invalid in respect of the transfer of the assignors' right about the second transaction.

On behalf of the contesting defendants it was urged that the suit of the plaintiff was not within limitation as it was governed by article 62 of the Indian Limitation Act. It was said that the agency terminated on the 29th

(1) (1924) I.L.R., 51 Cal., 972. (2) (1923) I.L.R., 47 Bom., 719.
(3) (1914) 27 Indian Cases, 115.

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of January, 1925, when the plaintiff's assignors are said to have been informed of the sale of the last lot of wheat bags. In my opinion article 62 of the Indian Limitation Act is not applicable to the case. In *Subba Rao* v. *Rama Rao* (1) it was held that article 62 could only apply to cases where a definite sum of money had been received by the defendant and which he was to hold for the use of the plaintiff and that it was not applicable to cases where the defendant was asked to account for moneys and where the person collecting was entitled to just allowances. In my opinion the learned Subordinate Judge was right in holding that article 89 of the Indian Limitation Act applied to the case in suits for accounts between principal and agent. It has been found that the contesting defendants credited the plaintiff's assignors with the proceeds of sale of nine bags of *arhar* on the 26th of September, 1925. Thus it will be seen that till at least that date the agency did not terminate. The suit having been instituted within three years from that date is within limitation. Under article 89 the period begins to run from the date on which accounts are demanded and refused during the continuance of the agency, or from the date on which the agency terminates. The defendants contended that the agency terminated on the 29th of January, 1925, when the plaintiff's assignors were told about the sale of the last lot of the wheat bags. But this plea is not correct. The evidence of Ram Prasad, the munim of the defendants, is that several days after the sale of the bags in Calcutta Mithu Lal went to the defendants and when he was offered Rs.356 he did not take it, saying that he would transact further business with them. In view of this statement of Ram Prasad it is not correct to contend that the agency had terminated on the 29th of January, 1925. The contesting defendants have not given any evidence to prove the exact date on which, according to them, the agency terminated. So, it will be taken that the agency

(1) (1916) I.L.R., 40 Mad., 291.

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continued till the demand for accounts made by the assignors of the plaintiff on the 2nd of March, 1925, was refused. The suit is, therefore, within limitation.

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The learned Subordinate Judge has found that about the first transaction a sum of Rs.1,771-13-3 is due to the plaintiff. But the defendants have established that the wheat purchased by the assignors of the plaintiff at the time of the second transaction was sold at a loss. They are entitled to claim an equitable set off in respect of such loss. The plea of set off is a good ground for defence. If established it affords an answer to the plaintiff's claim wholly or *pro tanto*. In the case before us the contesting defendants have proved by their account books that on taking account in respect of both the transactions only a sum of Rs.356-1-3 is due to the plaintiff. The plaintiff is entitled to recover this sum from the contesting defendants, together with the price of 28 bags of wheat not accounted for by the defendants. The price of these 28 bags of wheat comes to Rs.553. Thus the total amount due to the plaintiff from the contesting defendants comes to Rs.909-1-3. The plaintiff is, in my opinion, entitled to a decree for this amount.

I, therefore, allow the appeal, modify the decree of the court below and grant the plaintiff a decree for Rs.909-1-3. The rest of his claim stands dismissed. The plaintiff and the contesting defendants will receive and pay costs in both courts according to their success and failure.

NIAMAT-ULLAH, J. :—I agree.

REVISIONAL CIVIL

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Young

JAIMALA KUNWAR AND ANOTHER (DEFENDANTS) *v.* COLLECTOR OF SAHARANPUR (PLAINTIFF) AND OTHERS (DEFENDANTS)* 1933 *May*, 2

Civil Procedure Code, order I, rules 1 *and* 10—*Addition of parties—Representative suit—Withdrawal application—Right of other persons interested to intervene and maintain the suit—Suit by Collector on behalf of Hindu widow who had succeeded to her husband's estate (under Court of Wards) to contest an alleged adoption—Withdrawal of suit by Collector—Right of reversioner to be joined as a plaintiff and to continue the suit—Transposition of parties in revision —Court of Wards Act (Local Act IV of* 1912), *sections* 53, 55.

On behalf of two Hindu widows who had succeeded to their husband's estate, which was held under the Court of Wards, the Collector instituted a suit for a declaration that an alleged adoption set up by the principal defendant had not taken place and he had no title to the property, and for other reliefs against him and a transferee from him. Subsequently the Collector made an application withdrawing the suit; and this was opposed by the two widows as well as by a person who was, according to the plaint itself, the next reversioner and they asked to be made parties to the suit and to be allowed to continue it. The court allowed the Collector to withdraw the suit and dismissed it. The application of the others to be made parties was disallowed. The widows thereupon filed a revision in the High Court, making the reversioner a *pro forma* opposite party, who subsequently applied in the High Court to be transposed as an applicant for revision.

Held that the revision did not lie on behalf of the widows. The Collector having decided to withdraw the suit, his discretion could not, according to section 53 of the Court of Wards Act, be called in question by the civil court, and by virtue of section 55 of that Act the widows were unable, by themselves, to continue the suit. The lower court, in allowing the Collector to withdraw the suit and in rejecting the widows' application to continue it, could not be said to have acted illegally in the exercise of its jurisdiction, and no revision lay on their behalf. But the revision could be maintained at the instance of the reversioner, who had been impleaded as a

* Civil Revision No. 503 of 1932.

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party thereto, who was equally interested in it and who had applied to be transposed as an applicant; in such circumstances the fact that his application was a belated one did not stand in his way.

Where the plaintiff sues in a representative character it is not open to him to put an end to the litigation by merely withdrawing the suit. He may, no doubt, go out of the suit, but that does not put an end to the litigation where other people are interested in it and have a right to come in and continue the litigation.

The suit instituted by the Collector on behalf of the two widows who had succeeded to their husband's estate was a suit of a representative character, and the widows having only a limited estate the reversioner was also materially interested in the result of the suit. For the proper safeguarding of his interest the lower court should have allowed the reversioner to be added as a plaintiff before allowing the Collector to go out of the suit.

Although it might be that the provisions of order I, rule 10 of the Civil Procedure Code, or of any other rule, like order I, rule 1 of the Code, were not in terms applicable to the case, yet it was open to the court to allow the reversioner to be added as a plaintiff. Cases have arisen from time to time in which the provisions of the Civil Procedure Code have been found to be, in terms, inapplicable and yet parties have been added or substituted, where they ought to be added or substituted, on general principles.

Messrs. *S. K. Dar* and *Gopi Nath Kunzru*, for the applicant.

Dr. *S. N. Sen* and Messrs. *S. N. Gupta*, *S. N. Verma*, *G. S. Pathak*, *S. K. Mukerji* and *A. M. Gupta*, for the opposite parties.

MUKERJI and YOUNG, JJ. :—This is an application in revision and arises under the following circumstances. A suit was instituted by the Collector of Saharanpur on behalf of the estate of Lala Janeshar Das; the owners of the estate, for the time being, being Janeshar Das's two widows, Jaimala Kunwar and Chando Kunwar. It was alleged that the last owner of the property in suit was one Deep Chand, and on the death of his widow,

Mst. Dhani Kunwar, the property devolved on Janeshar Das and Badri Das, two brothers, in equal shares. The suit was directed, *inter alia*, to obtain a declaration that one of the defendants, Atma Ram, who professed to have been adopted by Dhani Kunwar was not at all adopted and that Janeshar Das and Badri Das were entitled to the property, and on the death of Janeshar Das and Badri Das their widows were entitled to recover the property. The widow of Badri Das, Mst. Phulwanti, was made a defendant in the case. The defendants to the suit were, besides Atma Ram, his brother Abheynandan Lal. We have already stated that Mst. Phulwanti was made a defendant. A fourth person, Abdul Majid Khan, was made a party as a transferee from Lala Atma Ram and Abheynandan.

The Collector of Saharanpur, who was the plaintiff in the suit, made an application to the court on the 19th of April, 1932, withdrawing the suit. This application was opposed by the widows, Jaimala Kunwar and Chando Kunwar, and one Beni Prasad. Beni Prasad, according to the allegations of the widows and himself and according to the pedigree stated in the plaint, was, along with his brothers, the next reversioner to the estate of Janeshar Das and Badri Das. Their application was dated the 19th of May, 1932, and was to the effect that they should be made parties to the suit and the conduct of the suit should be given to all or any one of them. In support of their application they filed an affidavit, which is on the record. Various allegations were made in this affidavit, the important allegations being that Beni Prasad was a reversioner to the estate of Janeshar Das and Badri Das and was therefore interested in the litigation.

On behalf of the Collector it was urged that he was the sole plaintiff and he was entitled to withdraw the suit at his pleasure and that under section 53 of the Court of Wards Act of 1912 his discretion could not be

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questioned by the civil court. The learned Subordinate Judge considered the application and held that the applicants could not be made parties, and having allowed the Collector to withdraw the suit, dismissed it with half the costs.

The application in revision is by Jaimala Kunwar and Chando Kunwar alone. Beni Prasad was made a *pro forma* respondent. On the 10th of April, 1933, Beni Prasad applied that he may be transposed to the array of the applicants as applicant No. 3. No order has yet been passed on this application and it is therefore before us for disposal.

On behalf of the respondents a preliminary objection has been taken that the revision is not maintainable because the learned Subordinate Judge had jurisdiction to hear the application of the Collector and as he applied his mind to the application and to the petitions of the applicants and Beni Prasad, the decision of the learned Subordinate Judge is final and is not open to revision by this Court.

It appears to us that so far as the petition of the two ladies, Jaimala Kunwar and Chando Kunwar, is concerned the learned Judge did apply his mind and wrote a judgment which, whether it be right or wrong, cannot properly be revised by this Court, under the provisions of section 115 of the Civil Procedure Code. We cannot interfere with an order simply because it is wrong in law. We must be satisfied that the lower court had acted illegally or with material irregularity in the exercise of its jurisdiction. The preliminary objection, therefore, must hold good as regards the applications of the two ladies.

So far as the application of Beni Prasad is concerned, we fear that it has not received a proper hearing and consideration from the learned Judge in the court below. He has totally misapprehended the nature of Beni

Prasad's application and dealt with it summarily. We shall deal with it at length in the course of this judgment.

It was next contended that Beni Prasad filed no petition in revision and his application of the 10th of April, 1933, being a belated one it could not be granted. We are not prepared to accept this contention. Beni Prasad was already a party to the revision filed by Jaimala Kunwar and Chando Kunwar and was therefore already before the court. Where out of three petitioners, two filed a revision against the order passed against their application, the third may very well accept that justice would be done towards the joint petition and the third need not file a separate application in revision. In this view we cannot reject Beni Prasad's application on the sole and simple ground that it is a "belated" one. The revisional jurisdiction of the High Court need not be invoked by a party and it may be exercised by the High Court of its own accord. We accordingly direct that the application of Beni Prasad for being put into the array of the applicants be granted and that the application in revision be amended accordingly.

Now we come to the merits of the case. On behalf of Beni Prasad it had been contended that the suit instituted by the Collector on behalf of the two ladies Jaimala Kunwar and Chando Kunwar was a suit of a representative character and it was necessary for the court below to allow Beni Prasad to be impleaded as a plaintiff in view of the fact that the Collector representing the widows was going to withdraw the suit. It was argued that the right to recover the property from the defendants accrued to Janeshar Das in his life time (according to the facts stated in the plaint) and that, therefore, if the suit instituted on behalf of the ladies be withdrawn, a valuable estate would be lost to the reversioners of Janeshar Das and Badri Das and no remedy would be left to Beni Prasad. No answer has been given to this argument. The argument that has been

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addressed to us on behalf of the respondents was mainly this. The Collector was the sole plaintiff and he had every right to withdraw the suit. Nobody can deny that the Collector as the sole plaintiff was entitled to withdraw the suit. But then nobody can deny that the Collector's suit was a suit on behalf of the ladies, Jaimala Kunwar and Chando Kunwar, and that, therefore, the suit of the ladies was a suit instituted by them in a representative capacity. These ladies had only a life interest in their husband's property and during their lives they represented the entire estate including the interests of the future reversioners to the estate. A decree properly obtained against Jaimala Kunwar and Chando Kunwar would bind those who would actually inherit the property on the death of the ladies. The mere fact that under section 55 of the Court of Wards Act of 1912 the ladies could institute the suit only in the name of the Collector did not prevent the suit as instituted by the Collector from being a representative suit. In this view of the case, Beni Prasad was materially interested in the result of the suit.

It has been held that where the plaintiff sues in a representative character it is not open to him to put an end to the litigation by merely withdrawing the suit. He may no doubt go out of the suit, but that does not put an end to the litigation where other people are interested in it and have a right to come in and continue the litigation.

To mention some instances of such cases: Where a trustee brings a suit for the benefit of the beneficiaries and then wants to nullify the result of the litigation, it has been held that the beneficiaries may be properly brought on the record to continue the litigation; *Sankaralinga Nadan* v. *Rajeswara Dorai* (1). The Civil Procedure Code itself recognizes the necessity of making the beneficiaries a party in certain circumstances; see

(1) (1908) I.L.R., 31 Mad., 236.

order XXXI, rule 1 of the Civil Procedure Code. In *Kunju Kombi Achan* v. *Ammu* (1) the head of a Malabar Tarwad instituted a second appeal and was anxious to compromise the case with the respondent. Two junior members of the family were allowed to prosecute the appeal in spite of the fact that the original appellant did not want to do so. The argument accepted by the court was that the suit was a representative one and the plaintiff must be subject to the orders of the court.

Cases of partition, accounts, dissolution of partnership and other similar cases may be cited as instances in which the plaintiff may withdraw a suit, but he cannot put an end to the litigation.

It is an established rule of Hindu law that where females representing an estate have rendered themselves incapable of safeguarding the rights of the reversioners, a distant reversioner may institute a suit to safeguard his interest: See *Adi Deo Narain Singh* v. *Dukharan Singh* (2); *Sachit* v. *Budhua Kuar* (3) and *Rani Anand Kunwar* v. *Court of Wards* (4).

In the case before us, the Collector on behalf of the ladies filed a representative suit. The Collector decided to withdraw the suit. The result was that by virtue of section 55 of the Court of Wards Act the ladies themselves, however anxious they may have been to continue the litigation, were unable to do so. In the circumstances, on principle, it must follow that the reversioner Beni Prasad should be permitted to continue the litigation. The result of disallowing Beni Prasad's request to continue the litigation would be that (assuming that the statements made in the plaint were correct) an estate worth $1\frac{1}{2}$ lakhs would go to the defendants without the smallest attempt being made to recover it. We are of opinion that Beni Prasad's application should have been allowed.

(1) (1931) 61 M.L.J., 549. (2) (1883) I.L.R., 5 All., 532.
(3) (1886) I.L.R., 8 All., 429. (4) (1880) I.L.R., 6 Cal., 764.

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It was, however, contended that Beni Prasad could not be impleaded because the language of order I, rule 10 of the Civil Procedure Code did not permit his being impleaded. Cases have arisen from time to time in which the provisions of the Civil Procedure Code have been found to be, in terms, inapplicable and yet parties have been added or substituted where they ought to be added or substituted, on general principles; for example, in *Keshab Rai Jieu Thakur* v. *Jyoti Prosad* (1) a mahant died and his successor in the office of the mahant was allowed to be substituted for him. The case did not fall strictly within the earlier rules of order XXII, but the court found that the successor in title of the mahant must be substituted and the order for substitution was sought to be justified by the application of rule 10 of order XXII. It is difficult to say that rule 10 completely covered the case and that it was a case of assignment, creation or devolution of any interest during the pendency of the suit. Similarly in *Pitchayya* v. *Rattamma* (2), which was a benamidar's suit, the true owner was substituted for him. In *Kadri* v. *Khubmiya Mahomedmiya* (3), where a scheme for the management of the trust had been framed and liberty to apply had been granted, it was held that persons who were not originally parties to the litigation could be brought in, to question the propriety of the scheme or to make proper applications to the court. The learned Judge relied on order I, rule 10. But it is doubtful whether that rule could, in terms, be applied. But it is perfectly clear that the order was a right one, and there is no rule in the Civil Procedure Code which directly applies. In the case of *Rajaratnam Iyer* v. *Halasyasundaram Iyer* (4) the presumptive heir was allowed to be brought on the record along with the widow to protect a reversionary interest. The suit was by one who claimed to have been adopted by the last male owner.

(1) A.I.R., 1932 Cal., 783.
(2) A.I.R., 1929 Mad., 268.
(3) A.I.R., 1931 Bom., 388.
(4) A.I.R., 1923 Mad., 521.

In all these cases the application for addition or substitution of parties did not fall within the language of the rules of the Civil Procedure Code and there was no difficulty to make the necessary order. In *Venkatanarayana Pillai* v. *Subbammal* (1) their Lordships of the Privy Council relied on order I, rule 1 for ordering the substitution of a more distant reversioner to continue a litigation which had been instituted by a closer reversioner.

There is, therefore, enough authority for holding that in a case like this it is open to the court to allow Beni Prasad to be made a party and then to allow the Collector to go out of the suit, if he does not want to prosecute it.

It is argued on behalf of Abdul Majid, the transferee defendant, that the moment the application was made by the Collector to withdraw the suit, the suit ceased to exist in the eye of the law and the court could not pass any order for substitution or addition on an application made to it on the 9th of May, 1932. This argument in our opinion is not correct. The case could not cease to exist till an order was made by the court and when the court came to pass an order it could pass an order not only on the application of the Collector, the original plaintiff, but also on the application of the two ladies and Beni Prasad.

In our opinion the learned Subordinate Judge should have allowed Beni Prasad to be added as a plaintiff before allowing the Collector to withdraw the suit.

We accordingly modify the order of the court below and direct that Beni Prasad be made a plaintiff in the suit and that the suit be tried as between Beni Prasad, on the one hand, and the original defendants, on the other.

(1) (1915) I.L.R., 38 Mad., 406.

APPELLATE CRIMINAL

Before Mr. Justice King and Mr. Justice Bajpai.

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May, 2

EMPEROR *v.* RAGHUNATH AND OTHERS*

Criminal Procedure Code, section 423—Powers of appellate court—Appeal from conviction—Charges of culpable homicide and rioting—Trial court convicting on the former but omitting to record either conviction or acquittal on the latter—Whether acquittal by necessary implication—Power of appellate court to convict on the latter charge.

At a sessions trial on charges of culpable homicide and rioting, under sections 304 and 147 of the Indian Penal Code, the Judge convicted and sentenced the accused persons under section 304, but omitted to record either a conviction or an acquittal on the charge of rioting under section 147. The language of the judgment, however, made it quite clear that the Judge found that the accused persons were guilty of rioting and that the homicide was an incident in the course of the riot and that the accused persons were therefore jointly responsible, although the individual responsibility of any one for the killing had not been established beyond doubt. In appeal against the conviction,—

Held that in the circumstances it could not be deemed that the accused persons had by necessary implication been acquitted of the offence under section 147; in fact the findings of the Judge amounted to a conviction under that section as well as under section 304. Further, under the provisions of section 423 of the Criminal Procedure Code, in an appeal from a conviction the appellate court had power to alter the finding while maintaining the sentence, and the conviction under section 304 could be altered into a conviction under section 304 read with section 149 of the Indian Penal Code although the Sessions Judge had not recorded any conviction under section 147 and therefore might possibly be deemed to have acquitted the accused of that charge. *Kishan Singh* v. *King-Emperor* (1), distinguished.

Messrs. *K. O. Carleton* and *Kumuda Prasad*, for the appellants.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

* Criminal Appeal No. 737 of 1932, from an order of D. C. Hunter, Sessions Judge of Moradabad, dated the 15th of August, 1932.

(1) (1928) I.L.R., 50 All., 722.

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KING and BAJPAI, JJ. :—This is an appeal by Raghunath and six other persons who have been convicted under section 304 of the Indian Penal Code. Two of the appellants, Kishan Sarup and Bishan Sarup, have been sentenced to eight years' rigorous imprisonment and the rest to six years. The case for the prosecution, briefly, was that on the 7th of May, 1932, Kishan Sarup and Bishan Sarup (who are zamindars and residents of Kanth) came with a number of men, about thirteen or fourteen in all, to the village of Qasimpur, which is about one mile from Kanth, for the purpose of collecting subscriptions. They intended to collect subscriptions for the defence of one Raghunath who was under trial before a Magistrate. The party came armed with spears and lathis. On arrival at Qasimpur they called for the Padhan named Girdhari, but he was not in the village. His brother Kanhaiya was then sent for and Kishan Sarup and Bishan Sarup demanded Rs.15 from him as subscription towards Raghunath's defence fund. Kanhaiya raised objections to paying the subscription and tried to go back into his house but he was followed up with abuse and Kishan Sarup struck him with a lathi. He fell down and shouted for help, whereupon Bishan Sarup ran him through with a spear. This gave rise to a general fight between the villagers and the visiting party. Blows were given and received by both sides and after some fighting the visiting party left the village. Kanhaiya was taken to the Kanth hospital where he died the same day.

The facts of the riot are sworn to by a number of witnesses, some of whom were unquestionably in the fight as they themselves received injuries. Such witnesses are Genda, Imrat, Bhup and Mohan. They and the other persons who swear to having seen or to having taken part in the fight, all give very much the same account. They all testify that the appellants

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were among the party who came under the leadership of Kishan Sarup and Bishan Sarup to the village of Qasimpur for the purpose of collecting subscriptions and when Kanhaiya refused to give the subscription demanded he was beaten by Kishan Sarup and stabbed with a spear by Bishan Sarup and that this started the fight between the villagers and the party of Kishan Sarup.

The learned Sessions Judge has found that it is not clearly proved that Kishan Sarup is the man who struck the first blow upon Kanhaiya, which gave rise to the subsequent fight. As a matter of fact, the medical evidence shows that there were no marks of lathi blows upon the person of Kanhaiya. He was killed by a spear thrust. The Sessions Judge also finds it doubtful whether Bishan Sarup was the man who killed Kanhaiya with the spear. He finds that undoubtedly the appellants were all among the party which came to the village for demanding subscriptions and that they were armed, some with lathis and others with spears, and that their common object was to extort subscriptions by show of force and by use of force if necessary. He further finds that on account of Kanhaiya's resistance to the demand for subscriptions some violence was used by the accused but it cannot be said by which individuals among them, and this started a general fight between the accused and the villagers in the course of which Kanhaiya was killed by one of the accused with a spear thrust and several other villagers were more or less seriously injured. The learned Sessions Judge does not find that the account given by the witnesses, namely that Bishan Sarup is the man who struck the blow with the spear, is definitely false. He finds indeed that Bishan Sarup *probably* was the man who was responsible for this spear thrust, but he thinks that in view of the language used in the first information report there is some doubt whether Bishan Sarup was specially and individually responsible for the mortal wound upon Kanhaiya Lal.

[The judgment then referred to the evidence and came to the conclusion that the appellants Kishan Sarup and Bishan Sarup were among the rioters and were the leaders and that the other five appellants also did take part in the fight.]

A question of law has been raised on the basis of the fact that the appellants have been convicted under section 304 of the Indian Penal Code only and have not been convicted under section 147 of the Indian Penal Code. The argument is that as the appellants were expressly charged with an offence under section 147 of the Indian Penal Code and have not been convicted of that offence, it must be assumed that they have been acquitted of the offence of rioting. As they have been acquitted of the offence of rioting, section 149 cannot be invoked for the purpose of establishing the joint responsibility of all the appellants for having caused the death of Kanhaiya. The appellants, moreover, cannot be held jointly responsible under section 34 of the Indian Penal Code, as the finding is that they had no common intention of killing Kanhaiya. As none of the appellants have been found individually responsible for causing Kanhaiya's death, their learned advocate claims that they are all entitled to an acquittal.

It appears to us that the learned Sessions Judge's finding is perfectly clear to the effect that the accused did become members of an unlawful assembly and that certain members of that assembly did use force and violence in prosecution of their common object which was to extort subscriptions by force, and therefore they were all guilty of the rioting. The learned Sessions Judge sums up his findings briefly as follows : "I have no doubt what happened. Kishan Sarup, Bishan Sarup, and a large body of retainers, the whole party armed with lathis and spears, appeared in Qasimpur and demanded subscriptions for Raghunath. They were refused and there was a fight. Kanhaiya was killed in the course of the fight, probably by Bishan Sarup, and that probably finished

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the fight." He further observes: "Of course these people did not come to the village intending to murder Kanhaiya or anybody else. But they did come in considerable force and heavily armed, intending thereby to extract subscriptions from people who might not be moved by mere persuasion. I cannot assume that they failed to realise that resistance might be met with, and I cannot assume that they intended their armament for mere display, not for use if occasion called. Exactly how the fighting started I cannot say. But when a gang of armed men come to a village to levy money and a fight starts, it is absurd for them to suggest that they are using these arms in self-defence. And people armed with lathis who go to support others armed with spears must be supposed to realise that in the confusion of a fight their companions' spears may inflict mortal injury, even though there be no positive desire of any single person to cause death."

This language is only consistent with the view that the accused were guilty of rioting and that the killing of Kanhaiya and the injuring of certain other villagers were incidents in the course of the riot and that the accused were jointly responsible, because the offences were committed by certain members of the riotous assembly, and were likely to be committed in the prosecution of their common object.

In such circumstances it is doubtful whether it could be held that the accused had by necessary implication been *acquitted* of the charge of rioting. For the appellants great reliance is placed upon the observations of their Lordships of the Privy Council in the case of *Kishan Singh* v. *King-Emperor* (1). In that case an accused person was charged under section 302 and was convicted under section 304 of the Indian Penal Code. The Local Government applied to the High Court in revision and the High Court accepted the application and directed that

(1) (1928) I. L. R., 50 All., 722.

the conviction of the accused should be altered to a conviction under section 302 and sentenced the accused to death. Their Lordships of the Privy Council held that the accused must be deemed to have been acquitted in the sessions court of the charge of murder, and that the order of the High Court resulted in altering the finding of acquittal to one of conviction, and that therefore the order was contrary to law.

In our opinion the present case can be distinguished upon the facts. In the case of *Kishan Singh* the accused had been charged with murder, and the trial court, in convicting him under section 304 of the Indian Penal Code, must be held to have acquitted him of the charge of murder by necessary implication even if it did not expressly record an acquittal under section 302. The learned Sessions Judge must have applied his mind to the question whether the accused was guilty of an offence under section 302 of the Indian Penal Code and must have come to the conclusion that he was not guilty of such an offence. In such a case no doubt it must be assumed that the trial court had acquitted the accused of the offence under section 302 of the Indian Penal Code.

The facts of this case are quite different. It is true that the learned Sessions Judge convicted the accused under section 304 only. He made no mention in his judgment, from beginning to end, of the other charges upon which the accused were being tried. But the whole trend of his judgment, as we have already shown, was that the accused were guilty of rioting. We think it would be wrong to hold that the accused had by necessary implication been acquitted of the offence under section 147 of the Indian Penal Code. The real fact seems to be that the learned Sessions Judge directed his attention exclusively to the principal charge under section 304 and failed to pay any attention to the charges of minor offences under sections 147 and 326. His findings amounted to a conviction under section 147 as well as

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under section 304. He merely omitted, probably by an oversight, to record a conviction under section 147 also. On this ground alone we think that this case can be distinguished from *Kishan Singh's* case (1).

Another reason why the ruling in *Kishan Singh's* case cannot be applied is that in that case the High Court were acting in exercise of their revisional powers under section 439 of the Code of Criminal Procedure. Their Lordships held that in exercise of *revisional* powers the High Court could not convert a finding of acquittal into a finding of conviction. There is no question in the present case of convicting the accused of the offence under section 302 of the Indian Penal Code after they have been acquitted of that offence. Nor are we sitting as a court of revision. We are sitting as a court of appeal, the accused having appealed against their conviction under section 304 of the Indian Penal Code, and the powers exercisable by us are powers under section 423 of the Code of Criminal Procedure. Under that section the High Court is entitled to alter the finding while maintaining the sentence. The question is whether the conviction under section 304 can be altered into a conviction under section 304 *read with section* 149 of the Indian Penal Code although the learned Sessions Judge has not recorded any conviction under section 147 and therefore might possibly be deemed to have acquitted the accused of that charge. On the merits we find it clearly proved that the appellants were guilty of rioting; and that, as mortal injuries were likely to be caused in the prosecution of their common object, they were also guilty of an offence under section 304 read with section 149 of the Indian Penal Code.

Numerous authorities have been cited which show that the trend of judicial opinion is in favour of the view for which the learned Government Pleader contends. He maintains that under section 423 of the Code of Criminal Procedure it is open to the High Court to convict under

(1) (1928) I. L. R., 50 All., 722.

section 147, although the trial court may have expressly acquitted the accused under that section, or may have merely failed to record an order either of conviction or of acquittal under that section. In support of this contention the following authorities have been cited : *Queen Empress* v. *Jabanulla* (1). In that case it was held that the appellate court can, under the provisions of section 423 of the Code of Criminal Procedure, in an appeal from a conviction alter the finding of the lower court and find the appellant guilty of an offence of which he was acquitted by that court. That was a case of converting an express acquittal into a conviction and their Lordships of the Calcutta High Court held that such a course was open to the High Court under section 423 of the Code of Criminal Procedure. The ruling goes farther than is necessary for the purpose of the present case where there is no express acquittal under section 147 but merely an omission to record a conviction under that section. This ruling was followed by a single Judge of this Court in *Emperor* v. *Sardar* (2). Here it was held that an appellate court can, under section 423 of the Criminal Procedure Code in an appeal from a conviction, alter the finding of the lower court and find the appellant guilty of an offence of which the lower court has declined to convict him. The same view was taken by the Madras High Court in *Golla Hanumappa* v. *Emperor* (3) and again by a single Judge of this Court in *Janki Prasad* v. *Emperor* (4). The whole trend of authorities is in one direction and not a single case has been cited before us in which a dissentient view has been expressed. In our opinion the Privy Council ruling in *Kishan Singh's* case (5) does not shake the authority of the rulings cited, as it does not interpret the powers of an appellate court under section 423 of the Code of Criminal Procedure but interprets the revisional powers of the High Court under section 439 of the same Code.

(1) (1896) I.L.R., 23 Cal., 975. (2) (1911) I.L.R., 34 All., 115.
(3) (1911) I.L.R., 35 Mad., 243. (4) (1926) 96 Indian Cases, 215.
(5) (1928) I.L.R., 50 All., 722.

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Following these authorities, therefore, we hold that we are entitled to alter the conviction under section 304 to a conviction under section 304 read with section 149 of the Indian Penal Code. We accordingly do so. We think it unnecessary to record a formal conviction and to pass a concurrent sentence under section 147 of the Indian Penal Code.

As regards the sentences we think that the sentences passed upon Kishan Sarup and Bishan Sarup of eight years' rigorous imprisonment are not excessive. These two were clearly the ring-leaders. They were influential men and they were trying to extort subscriptions by force from certain villagers. They must have known that such objectionable and forcible methods would be likely to result in fighting and serious bodily injuries. We therefore dismiss their appeals.

As regards the other five appellants we think that the sentences are somewhat unnecessarily severe because they had no personal interest in collecting these subscriptions and they must have come as mere retainers of the two principal accused and were no doubt acting under their influence and orders. Moreover, the prosecution evidence does not show that they personally committed any specific acts of violence. We therefore maintain the convictions of these five appellants but reduce the sentences from six years' to three years' rigorous imprisonment.

REVISIONAL CRIMINAL

Before Mr. Justice Kendall and Mr. Justice Iqbal Ahmad

EMPEROR *v.* BAFATAN*

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May, 19

Municipalities Act (Local Act II of 1916), *sections* 180(5), 185—*Construction of building before sanction—Notified Area—Whether section* 180, *clause* (5) *applicable to Notified Areas—Municipalities (Amendment) Act (Local Act II of* 1919), *sections* 14, 15—*Interpretation of statutes—When certain sections of an Act are made applicable, by the authority having power to do so, to a particular subject, whether subsequent amendments in those sections also become automatically applicable—Municipalities Act (Local Act II of* 1916), *section* 314—*Complaint under section* 185 *filed by President of Notified Area Committee, whose election as President was invalid—Jurisdiction.*

Inasmuch as the Local Government has not, in the exercise of the powers vested in it by section 338 of the Municipalities Act, II of 1916, extended to Notified Areas the provisions of the Municipalities (Amendment) Act of 1919, the amendments introduced by the latter Act do not apply to Notified Areas. Accordingly, clause (5) of section 180 of the Municipalities Act has no application to Notified Areas. Although section 180 was one of the sections made applicable to Notified Areas by Government notifications in June, 1917, the subsequent addition to that section made by the Act of 1919 did not *ipso facto* apply to Notified Areas.

So, where a person gave notice to the Notified Area Committee of his intention to make certain constructions, and commenced those constructions without having received either any sanction, conditional or unconditional, or any refusal from the Notified Area Committee, it was *held* that he could not be prosecuted under section 185 of the Municipalities Act.

Where the President of a Notified Area Committee was authorised by resolution to file prosecutions and complaints, and a complaint under section 185 of the Municipalities Act was filed by a person as President, whose election as President was subsequently held by a civil court to be invalid, it was *held* that the complaint not having been filed by an authorised person according to section 314 of the Municipalities Act, the Magistrate had no jurisdiction to try the case and the conviction was illegal.

*Criminal Reference No. 642 of 1932.

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Mr. *Saila Nath Mukerji*, for the applicant.

Mr. *Shiva Prasad Sinha*, for the opposite party.

KENDALL and IQBAL AHMAD, JJ. :—This is a reference by the Sessions Judge of Mirzapur recommending that the conviction of Mst. Bafatan under section 185 of the Municipalities Act (Local Act No. II of 1916, as amended by Act II of 1919) and the sentence of fine of Rs.15 passed on her be set aside. The reference came up before a learned Judge of this Court, who referred it to a Bench of two Judges.

The facts giving rise to the reference are as follows. By an application dated the 14th of January, 1931, Mst. Bafatan notified her intention to the Chunar Notified Area Committee to construct enclosure walls and a *kothri* in her house and prayed for permission to make the said constructions. * * * B. Mathura Prasad, the President of the Notified Area Committee, inspected the locality on the 29th of March, 1931, and found that Mst. Bafatan had already made certain constructions without the permission of the Notified Area Committee. A notice was then issued to Mst. Bafatan calling upon her to show cause why she should not be prosecuted for building her house without the permission of the Notified Area Committee and eventually a complaint was filed against Mst. Bafatan under section 185 of the Municipalities Act by B. Mathura Prasad, the President of the Notified Area Committee, in the court of Thakur Ram Singh, a Magistrate of the first class. The learned Magistrate convicted Mst. Bafatan for an offence punishable under section 185 of the Municipalities Act and sentenced her to pay a fine of Rs.15. Mst. Bafatan filed an application in revision in the court of the Sessions Judge against the order of the Magistrate and the learned Sessions Judge being of opinion that the conviction was bad in law has made the present reference to this Court with the recommendations noted above.

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The question for consideration in the present reference is whether the conviction of Mst. Bafatan under section 185 of the Municipalities Act as regards the constructions made by her is legally sustainable. The decision of this question depends on the answer to the question whether the amendments made in the Municipalities Act (Act II of 1916) by Municipalities Amendment Act (Act II of 1919) do or do not apply to Notified Areas.

By section 337 of the Municipalities Act the Local Government is authorised to declare, by a notification, that in respect of any local area, other than a municipality, town area or agricultural village, it is desirable to make administrative provision for some or all of the matters described in sections 7 and 8 of the Act, by extending thereto the provisions of chapter XII of the Act which deals with Notified Areas. It is further provided by that section that a local area in regard to which such a notification has been issued is to be called a Notified Area. The power to apply or adapt to a Notified Area the provisions of any section of the Municipalities Act, or of any Act which may be applied to a municipality, or part of such section, or any rule, regulation or bye-law in force or which can be imposed in a municipality under the provisions of the Municipalities Act or any other Act, is reserved to the Local Government by section 338 (1)(*a*) of the Municipalities Act. In exercise of these powers the Local Government has declared various areas in the United Provinces of Agra and Oudh to be Notified Areas and by notifications dated the 6th of June, 1917, and the 11th of June, 1917, has extended to such areas generally the provisions of certain sections or portions of sections of the United Provinces Municipalities Act (Act No. II of 1916). It has further been declared by these notifications that where a Commissioner decides that the circumstances of any Notified Area in his division are such as to require the application of any other section or portions of sections of the Municipalities Act, he can apply or adapt such

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sections or portions thereof to a particular Notified Area. Sections 178 to 185 of the Municipalities Act, which regulate the conditions on which a new building or any material alteration in a building, etc., may be made and provide the penalties for the breach of the rules contained in those sections, have been applied to all the Notified Areas in the United Provinces by the notifications referred to above. The sections that are relevant for the purposes of the reference before us are sections 178, 180 and 185 of the Act. Section 178 of the Act as applied to the Notified Areas requires that before beginning to erect a new building or making an alteration in a building a person should, in certain cases, give notice of his intention to do so to the Notified Area. Section 180 of the Act (Act II of 1916) contained four clauses and authorised Municipal Boards to refuse or to sanction any work, of which notice had been given, either absolutely or subject to certain conditions, and the section further reserved to the person giving the notice the right, in the event of the Board neglecting or omitting to pass an order on the notice given to it under section 178, to call the attention of the Board to the neglect on its part. A further sub-clause, sub-clause (5), was added to section 180 by the United Provinces Municipalities Amendment Act (Act II of 1919). That sub-clause runs as follows: "No person shall commence any work of which notice has been given under section 178 until sanction has been given or deemed to have been given under this section."

The addition of sub-clause (5) to section 180 necessitated an addition in section 185 of the Municipalities Act (Act II of 1916) and certain words were inserted in that section by the same Amending Act (Act II of 1919). Section 185 of Act II of 1916 ran as follows: "Whoever begins, continues or completes the erection or re-erection of . . . . . a building. . . . . without giving the notice required by section 178, or in contravention of an order of the Board refusing sanction

or any written directions made by the Board under section 180 or any bye-law, shall be liable upon conviction to a fine which may extend to Rs.500." By the Amending Act of 1919 the words "of the provisions of section 180, sub-clause (5), or" were inserted in the section between the words "or in contravention" and "of an order of the Board".

Before the amendments noticed above were introduced by the Amending Act of 1919 it was perfectly open to a person to proceed with the construction of any building of which notice had been given under section 178 without waiting for the sanction of the Municipal Board, provided that before the commencement of the building the Board had not communicated to him an order refusing sanction or any written direction that it thought fit to issue under section 180 of the Act. In other words the right of a person, who had given the notice contemplated by section 178, to proceed with the proposed constructions was subject only to this condition that the Board could, in the exercise of the powers vested in it by section 180, refuse permission to make the proposed constructions or call upon the person giving the notice to make the constructions subject to certain conditions, and a disregard of the order of the Board either refusing sanction or according sanction subject to certain conditions was made penal by section 185 of the Act. By the Amending Act of 1919, for the first time, a further condition was imposed that the person giving notice under section 178 could not commence the construction of the building unless and until sanction had been given by the Board for the construction of the same, and it was provided that a person who commenced the construction of a building without the sanction of the Board would be liable to a fine which may extend to Rs.500. It is not disputed that the Local Government has not, in exercise of the powers vested in it by section 338 of the Act, extended to Notified Areas the provisions of the Amending

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Act of 1919. There is no escape, therefore, from the conclusion that no section of the Municipalities Act (Act II of 1916) as applied to Notified Areas provides that a person is not to construct a building without having previously obtained the sanction of the Notified Area. It is not alleged that after Bafatan had given the notice referred to above, and before she proceeded to construct the building, the Notified Area either refused sanction or communicated to her any direction as regards the conditions on which she could make the building. She, therefore, did not contravene any of the provisions of the Act as applied to Notified Areas as regards the constructions of buildings and could not be convicted under section 185 of the Act.

It was argued on behalf of the Notified Area that as sections 180 and 185 of the Municipalities Act were notified by the Local Government to apply without any modification to Notified Areas, any subsequent amendments of these sections of the Act do *ipso facto* apply to Notified Areas. Reliance was placed on section 8 of the United Provinces General Clauses Act in support of this argument. The argument is untenable. Section 8 of the General Clauses Act is as follows: "Where any United Provinces Act repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted." The provisions contained in sections 178 to 185 of the Act (Act II of 1916) have not been repealed and re-enacted by any Act of the Local Legislature, and, therefore, section 8 of the General Clauses Act has no application to the case before us. All that has been done by the Amending Act of 1919 is to make certain additions to sections 180 and 185 of the Act. These additions not having been applied to Notified Areas cannot regulate and govern the constructions of buildings

in those areas. We hold, therefore, that Mst. Bafatan was perfectly entitled to make the constructions without awaiting the sanction of the Notified Area, and her conviction under section 185 of the Act was bad in law.

* * * * *

There is yet another unanswerable objection to the maintainability of the conviction of Mst. Bafatan. The complaint, as already stated, was filed by B. Mathura Prasad as President of the Notified Area Committee. It was contended on behalf of the accused that B. Mathura Prasad was not duly elected President of the Notified Area, and, therefore, in view of the provisions of section 314 of the Act, the court could not take cognizance of the offence alleged to have been committed by Mst. Bafatan on a complaint filed by B. Mathura Prasad.

By a resolution dated the 26th of April, 1931, the Notified Area Committee authorised "B. Mathura Prasad Sahib to incur expenditure up to the sanctioned budget limit" and further authorised "the President B. Mathura Prasad Sahib to file prosecutions and complaints in general, under the sections of the Notified Area Act." These resolutions make it manifest that whereas B. Mathura Prasad was authorised in his individual capacity to incur expenditure, the authority delegated to him to file complaints was in his capacity as President of the Notified Area. It is admitted that it has been held by the civil court that the election of B. Mathura Prasad as President of the Notified Area, Chunar, was invalid. B. Mathura Prasad not being a duly elected President of the Notified Area Committee could not, in exercise of the delegated authority, legally file the complaint against Mst. Bafatan and the learned Magistrate had no jurisdiction to proceed with the case.

For the reasons given above we accept the reference, set aside the conviction of Mst. Bafatan and direct that the fine, if paid, be refunded to her.

Before Mr. Justice Kendall and Mr. Justice Iqbal Ahmad

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EMPEROR *v.* NAZIRUDDIN AND OTHERS*

Criminal Procedure Code, section 106—Security for keeping the peace upon conviction for simple hurt—"Breach of the peace", not necessarily of the public peace—Simple hurt is an offence involving breach of the peace—Whether reasons for requiring security must be recorded.

The words "assault or other offence involving a breach of the peace" in section 106 of the Criminal Procedure Code include the offence of causing hurt under section 323 of the Indian Penal Code, and a person convicted of that offence can be ordered to find security to keep the peace under section 106 of the Criminal Procedure Code.

A "breach of the peace" does not necessarily mean a breach of the public peace, and the offence of causing hurt to a person involves a breach of the peace, whether it takes place in a private room or in the open street. From the language of section 107 of the Criminal Procedure Code it appears that a "breach of the peace" is to be regarded as something distinct from a "disturbance of the public tranquillity".

Muhammad Rahim v. *Emperor* (1) and *Emperor* v. *Atma Ram* (2), dissented from.

The law does not provide that the court acting under section 106 of the Criminal Procedure Code shall record its reasons for forming the opinion that it is necessary to take security in the case; but it is desirable for the court to do so in order that an appellate court may be in possession of the reasons if they are not apparent on the face of the record.

Mr. *M. A. Aziz*, for the applicants.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

KENDALL and IQBAL AHMAD, JJ. :—This is an application for the revision of an order of Mr. L. G. Lyde, City Magistrate of Cawnpore, who convicted the applicants of offences under section 323 of the Indian Penal

*Criminal Revision No. 246 of 1933, from an order of J. Allsop, Sessions Judge of Cawnpore, dated the 4th of March, 1933.

(1) (1925) 23 A.L.J, 1053. (2) (1926) I.L.R., 49 All., 131.

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Code and sentenced them to small fines, and further passed an order binding them over to keep the peace under section 106 of the Code of Criminal Procedure. The Sessions Judge has already rejected an application for revision. So far as the facts of the case are concerned it is only necessary to state that the applicants and the opposite parties have a quarrel which dates back over 30 years, and that there has been a great deal of litigation between them. The incident out of which this case arose has been decided by the City Magistrate in accordance with the statements of the witnesses before him and we see no reason to examine them in order to decide in revision whether his decision appears to be justified by the evidence. The point that has been argued before us is a legal one, namely, whether the Magistrate was legally justified in passing an order under section 106 of the Code of Criminal Procedure.

Mr. *Aziz* has argued, firstly, that the order of the Magistrate does not clearly show that there was an offence under section 323 of the Indian Penal Code; secondly, that there is no clear finding that there was a breach of the peace; thirdly, that an offence under section 323 of the Indian Penal Code does not necessarily involve a breach of the peace; and fourthly, that the court has not recorded a separate finding that it is necessary to require the applicants to execute bonds for keeping the peace.

The Magistrate has not given a detailed account of the evidence, but his conclusion is: "I have no real doubt that the accused beat the complainant. I convict them accordingly under section 323 of the Indian Penal Code." This is the reply to the first argument of Mr. *Aziz*.

We may take the second and third pleas together. There has been some difference of opinion as to whether

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an offence under section 323 of the Indian Penal Code necessarily involves a breach of the peace; and, if it does not, there is some force in the contention that in order to take proceedings under section 106 of the Code of Criminal Procedure the Magistrate must record a finding that in the particular case before him a breach of the peace is involved. Mr. *Aziz* has referred in the first place to a decision of a Bench of the Calcutta High Court in the case of *Abdul Ali Chowdhury* v. *Emperor* (1), in which it was held that in order to bring a case within the terms of section 106 of the Code of Criminal Procedure, the Magistrate should expressly find that the acts of the accused involved a breach of the peace or were done with the evident intention of committing the same, or at all events the evidence must be so clear that, without an express finding, a superior court is satisfied that such was the case. The Bench was dealing with a case in which there had been a conviction under section 143 of the Indian Penal Code and it was pointed out that a conviction under that section does not necessarily carry with it the implication that the persons convicted had the intention of committing a breach of the peace. Mr. *Aziz's* argument is that at the time of this decision in 1915 section 143 of the Indian Penal Code was one of those for which accused persons could be bound over under section 106 of the Code of Criminal Procedure, and he seeks apparently to draw an inference from this fact that in the case of every offence mentioned in section 106 of the Code of Criminal Procedure it is necessary for the Magistrate to record a separate finding, in accordance with the dictum of the Calcutta High Court, that there has been a breach of the peace, in addition to holding that the actual offence has been committed. We quite agree that the offence of being a member of an unlawful

(1) (1915) I.L.R. 43 Cal., 671.

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assembly does not necessarily imply a breach of the peace, although it is one of those offences enumerated in chapter VIII of the Indian Penal Code as offences against the public tranquillity. It does not follow from this, however, that the offence of causing simple hurt, which is one of those offences enumerated in chapter XVI of the Code as offences affecting the human body, does not necessarily imply a breach of the peace. There is, it must be admitted, some authority for this proposition. We have been referred especially to the decisions of a single Judge of this Court in the cases of *Muhammad Rahim* v. *Emperor* (1), and *Emperor* v. *Atma Ram* (2). In the earlier of these cases BANERJI, J., remarked that "in the absence of a finding that the assault which took place involved breach of the peace or public tranquillity, the Magistrate cannot merely on the ground that the parties were on bad terms bind the accused down." In the later case, which was also one under section 323 of the Indian Penal Code, the Sessions Judge who referred the matter to the High Court remarked: "Now section 323 of the Indian Penal Code is not an offence referred to in section 106 of the Code of Criminal Procedure, but even then an order can be passed after a conviction under this section if it was found by the Magistrate that the offence involved a breach of the peace. But there must be a finding of the Magistrate; otherwise his order is not justified." The reference was accepted by the same learned Judge who had decided the earlier case. These two decisions amount to this that although it is legal to demand security under section 106 of the Code of Criminal Procedure on a conviction under section 323 of the Indian Penal Code, it is necessary for the Magistrate to come to a separate and distinct finding that in that particular case there has been a breach of the peace, and the inference may

(1) (1925) 23 A.L.J., 1053. (2) (1926) I.L.R., 49 All. 131.

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logically be made from this that an offence under section 323 of the Indian Penal Code does not necessarily involve a breach of the peace. A similar view was taken in a case dealt with in the court of the Judicial Commissioner of Oudh, *Dubri* v. *Emperor* (1). This was a case under section 325 of the Indian Penal Code in which the Judicial Commissioner, Mr. Lindsay afterwards a Judge of this Court, briefly discussed the expression "breach of the peace" and remarked that "using that phrase in the accepted meaning which it bears in England, it implies some offence against the public"; and as in the case before him it had not been proved that there was any offence against the public, or that there was any likelihood of any offence being committed which would amount to a breach of the peace in the sense just mentioned, he discharged the order for taking security from the accused. A similar view was taken in the case of *Durga Bharathi* v. *Emperor* (2); but in a later case, *Emperor* v. *Ramanuj* (3), a Bench of the Oudh Chief Court differed from the ponouncement of the Judicial Commissioner and held that the words "assault or other offence involving a breach of the peace" in section 106 of the Code of Criminal Procedure clearly include the offence of causing hurt under section 323 of the Indian Penal Code, and a person convicted of the latter offence can be ordered to find security to keep the peace under section 106 of the Code of Criminal Procedure.

It appears to us that this view of the law, as it stands today, is the correct one. Under section 106 of the Code of Criminal Procedure, "Whenever any person accused of any offence punishable under chapter VIII of the Indian Penal Code, other than an offence punishable under section 143, section 149, section 153A or section 154 thereof, or of assault or other offence

(1) (1920) 71 Indian Cases, 691. (2) (1922) 72 Indian Cases, 955.
(3) (1926) 99 Indian Cases, 352.

involving a breach of the peace . . . . . is convicted of such offence . . . . and such court is of opinion that it is necessary to require such person to execute a bond for keeping the peace, such court may, at the time of passing sentence on such person, order him to execute a bond . . . . for keeping the peace during such period, not exceeding three years, as it thinks fit to fix." It is to be observed that the words used are "assault or other offence involving a breach of the peace", and the natural interpretation of these words is that an assault involves a breach of the peace, otherwise the words used would have been "assault or any offence involving a breach of the peace". An assault is defined in section 351 of the Indian Penal Code as follows: "Whoever makes any gesture or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault." The offence of assault, therefore, is one that is committed against a person and not against the public. According to our interpretation of the words "assault or other offence involving a breach of the peace" the legislature clearly intended to convey that the offence of assault did involve a breach of the peace, and *a fortiori* the offence of actually causing hurt to a person must also involve a breach of the peace. It is not necessary that the public should be assaulted or hurt, or that the offence should take place in public. The offence itself is a breach of the peace, whether it takes place in a private room or in the open street. We may notice that under section 107 of the Code of Criminal Procedure security may be demanded from any person who is "likely to commit a breach of the peace or disturb the public tranquillity", that is to say, a breach of the peace is to be regarded as something distinct from a disturbance of the public tranquillity

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and we can find no justification in the Criminal Procedure Code or the Indian Penal Code for the view that a breach of the peace necessarily means a breach of the public peace. If this is so it follows that the offences of assault and of causing hurt necessarily involve a breach of the peace, and we, therefore, feel compelled to disagree, with all respect, from the pronouncements of BANERJI, J., which we have quoted above, and which contain the implication that there may be instances of causing hurt which do not involve a breach of the peace within the meaning of section 106 of the Code of Criminal Procedure. Consequently if a Magistrate finds that an offence of causing simple hurt has been committed, it is not necessary for him to come to a separate finding that a breach of the peace was involved.

It does not follow that in every case the court is bound to take security from a person convicted of an offence which involves a breach of peace. The court must be "of opinion that it is necessary to require such person to execute a bond for keeping the peace", and in many cases, of course, it may be quite unnecessary. The law does not provide that the court shall record its reasons for forming that opinion, but we have no doubt that it is desirable for the court to do so in order that an appellate court may be in possession of the reasons if they are not apparent on the face of the record. We are not in the present case called upon to decide whether, if there are no reasons apparent on the face of the record and no reasons have been recorded by the court for having formed the opinion that it is necessary to require the security, the order would be an illegal one. The order of Mr. Lyde makes it clear that there were sufficient reasons for demanding security, and he has stated them: "Parties have already had two civil and revenue and six criminal cases between them. The punishment, therefore, should be such as to prevent

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future squabbles." By punishment the Magistrate apparently meant to include the order demanding security. We, therefore, hold that the application for revision must fail and it is dismissed.

Before Mr. Justice Kendall

EMPEROR *v.* PARSHOTTAM DAS TANDON*

1933
May, 29

Criminal Procedure Code, section 435—Revision in High Court without first applying to Sessions Judge—Practice—Criminal trial—Proof—Conviction must be based on sufficient evidence and is not justified by apathy of accused or his willingness to go to jail—Duty of court.

In a prosecution under section 17(2) of the Criminal Law Amendment Act, 1908, the evidence was not sufficient to establish the charge and the Magistrate, without being entirely satisfied that the charge had been proved, accommodated the accused, who made no serious effort to avoid a conviction and was willing from political motives to go to jail, by convicting and sentencing him to imprisonment. The Secretary of the District Bar Association filed a revision in the High Court from this order. *Held*—

The High Court is not bound to refuse an application in revision in every case merely because it had not been presented first in the court of the District Magistrate or Sessions Judge, and it can not be questioned that the High Court has jurisdiction, notwithstanding such omission of the applicant, to intervene in revision where it is necessary for the ends of justice. The rule of practice laid down in *Sharif Ahmad* v. *Qabul Singh* (1) has no doubt been generally but not invariably followed, and has been departed from in cases where there are special circumstances, such as where an application is presented by an outsider to the proceedings, or where the appeal from the court whose order is challenged lies direct to the High Court.

*Criminal Revision No. 107 of 1933, from an order of F. H. Logan, Magistrate, first class of Allahabad, dated the 9th of December, 1932.

(1) (1921) I.L.R., 43 All., 497.

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The courts are bound to protect the liberty of the individual, and even where the accused person does not claim their protection and shows himself ready to be sent to jail, whether from political or economical motives, it is nevertheless the duty of the courts to sift the evidence for the prosecution and to refuse to convict if that evidence is insufficient to prove the charge, not only because this is required by the law but also because the courts have a duty to protect the tax-payer from the unjustifiable expenditure of maintaining such accused person in jail.

Mr. *K. D. Malaviya*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

KENDALL, J. :—This is an application made by one Mr. R. N. Basu, as Secretary of the District Bar Association of Allahabad, for the revision of an order of a Magistrate convicting B. Parshottam Das Tandon of an offence under section 17(2) of the Criminal Law Amendment Act and sentencing him to six months' rigorous imprisonment. That term of imprisonment has, I understand, already been served and the application is made on legal and technical grounds. A preliminary objection of some difficulty has been raised to the hearing of the application on the ground that no application was first made to the Sessions Judge. In the case of *Sharif Ahmad* v. *Qabul Singh* (1) it has been laid down by a Bench of this Court as a rule of practice that an application to the lower court should be considered an essential step in the procedure, and that should be so, whether the District Magistrate or the Sessions Judge has power to grant the relief or not. "In future, therefore, failure on the part of the applicant to submit his application to the lower court will operate as a bar to the application being entertained by the High Court." If this rule of practice had been followed, the present application would have been rejected on the ground that it had not been presented to

(1) (1921) I.L.R., 43 All., 497.

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the Sessions Judge. The rule of practice has been followed in numerous cases, but it has been pointed out that it has not been invariably followed. In the case of *In the matter of Narain Prasad Nigam* (1), STUART, J., pointed out that the High Court had jurisdiction to call for and examine the record of proceedings in a Magistrate's court, however the matter is brought to its notice. This decision is one year later than that of the Bench which lays down the practice of the court, but there is nothing in it to show that the decision of the Bench was brought to the notice of the learned Judge who so emphasised the powers of intervention by the High Court. In the much more recent case of *Girdhari Lal Agarwala* v. *King-Emperor* (2), a Bench of this Court also interfered in revision with the order of the District Magistrate in spite of the fact that no application had been presented to the court of the Sessions Judge. In both these cases it is to be noted that the application was presented, not by the person who had been convicted by the Magistrate, but by some person who was no party to the proceedings at all and who wished to intervene either as *amicus curiae* or it may be in the interests of the public. In still another case, *Emperor* v. *Balkrishna Sharma* (3), the present CHIEF JUSTICE admitted an application for revision when no application had been made to the Sessions Judge, and remarked: "No doubt it is the general practice of this Court not to entertain a revision when the applicant could have gone to the superior court of the District Magistrate or the Sessions Judge. But, of course, even a settled practice does not oust the jurisdiction of the High Court." This was not a case in which a third party had intervened, but there was a special circumstance in that the offence was one under section 124A, which is triable by either the District

(1) (1922) I.L.R., 45 All., 128. (2) [1930] A.L.J., 1535.
(3) (1931) I.L.R., 54 All., 331.

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Magistrate or the Sessions Judge, and the appeal lies in either case direct to the High Court. No doubt the practice laid down in *Sharif Ahmad* v. *Qabul Singh* (1) has been followed in numerous cases but it has not been invariably followed, and, as I have shown, there is authority for departing from it in cases where an application is presented by an outsider to the proceedings, or where the appeal from the court whose order is challenged lies direct to the High Court. It can, of course, not be questioned that the High Court has jurisdiction to intervene in revision where it is necessary for the ends of justice, and although I think it must be taken still to be the invariable practice of the Court to refuse to entertain applications in revision where there are no special circumstances such as those that I have referred to above, it cannot be held to be bound to refuse an application in every case merely because it had not been presented in the lower court of appeal. I have therefore heard this application and the connected one on their merits.

There is a special reason for admitting and hearing the present application, for the case appears to be one in which the person convicted, B. Parshotam Das Tandon, was by no means unwilling to be convicted, and the Magistrate has accommodated him without being entirely satisfied that the charge had been proved by the prosecution. This charge was of having persisted in the management of the Allahabad Town Congress Committee, an unlawful association. It has been pointed out by Mr. *K. D. Malaviya* that although the Allahabad Town Congress Committee has been declared to be an unlawful association by the Local Government, there are several branches of the Congress organization which have not been declared to be unlawful, and there was no positive evidence in this case to prove that the accused had been assisting the Allahabad Town Congress

(1) (1921) I.L.R., 43 All., 497.

Committee as distinguished from other associations. The evidence against him was of three kinds. There was that of a sub-inspector, Amjad Ali, to testify that it was to his personal knowledge that the accused had been collecting subscriptions on behalf of the Congress and meeting Congress leaders. He may well have done so, but unless it could be proved that he had been collecting subscriptions on behalf of the Allahabad Town Congress Committee the statement of the witness does not definitely show that the accused was assisting that committee. It was further shown that the accused with some others made himself prominent in connection with a meeting called in the Parshottam Das Park which the Magistrate has found to be a "Congress meeting". But there is no evidence to show that it was convened or held under the auspices of the Allahabad Town Congress Committee. Lastly, there was the evidence of some accounts, on which, however, the Magistrate has not relied because he has accepted the word of the accused that they were purely private accounts and had nothing to do with the Allahabad Town Congress Committee. As the Magistrate himself says, the prosecution evidence was not very strong or very circumstantial, and in order to convict the accused he was compelled to rely on the fact that the accused himself, although he made a statement apparently of considerable length and referred to the accounts, did not deny that he had been doing work for the Congress.

I think it is clear from the judgment of the Magistrate that he was doubtful of the soundness of the case and would have acquitted the accused if the accused himself had made any serious effort to avoid a conviction. The circumstances, as I have suggested earlier in this judgment, evidently were that the accused was anxious or willing to go to jail, and the Magistrate was ready to accommodate him. This, however, was not

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a judicial point of view. The courts are bound, of course, to protect the liberty of the individual, but even when the individual does not claim their protection and is ready to forgo his liberty the courts have to consider that there are other questions than the wishes of the parties to the proceedings, by which they have to be guided. If the accused is sent to jail he has to be confined there and maintained there at the expense of the public, and whether his wish to go to jail arises from political or economical motives, it is the duty of the courts to protect the tax-payer. I think, therefore, that the present applicant is entitled to succeed, and that the order convicting B. Parshottam Das Tandon and sentencing him to six months' rigorous imprisonment must be set aside on the ground that no offence has been proved by the evidence for the prosecution, and I order accordingly.

Before Mr. Justice Kendall

EMPEROR *v.* PARSHOTTAM DAS TANDON*

1933
May, 29

Police Act (*V of* 1861), *section* 30—*Public thoroughfare—Public park with paths across it—Whether the "park" as a whole is a "thoroughfare"*.

The accused and other persons convened a meeting to be held in a public park, whereupon the accused was served with an order under section 30 of the Police Act directing him to apply for a license for holding the meeting in the park. The order having been disobeyed, the accused was convicted under section 32 of the Police Act. *Held*, in revision, that the order issued under section 30 was *ultra vires;* the order related to the park, and the park as a whole could not be deemed to be a public "thoroughfare", although there were paths in it, used by the public, which led to public roads. There might or might not be a public right of way through the park, but

*Criminal Revision No. 106 of 1933, from an order of F. H. Logan, Magistrate of the first class of Allahabad, dated the 9th of December, 1932.

certainly the park was not intended to be exclusively used as a thoroughfare and this was not its chief or primary object. It was no doubt a public place, but section 30 of the Police Act did not refer to a "public place".

Mr. *K. D. Malaviya*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

KENDALL, J. :—This application is connected with Criminal Revision No. 107 of 1933, and has been made like that by Mr. R. N. Basu, Secretary of the District Bar Association, Allahabad, on behalf of the accused B. Parshottam Das Tandon, who was fined Rs 200 under section 32 of the Police Act by the City Magistrate of Allahabad. I have discussed in the connected case the question of whether an application for revision can be entertained by the High Court without having been presented in the sessions court, and held that in certain specified cases such an application may be entertained; and I have held further that even where an accused person, as in the present case, refuses to plead and shows himself ready to be sent to jail, it is nevertheless the duty of the court to sift the evidence for the prosecution and to refuse to convict the accused if that evidence is insufficient to prove a definite offence, not only because this proceeding is required by the law but also because the courts have a duty to protect the taxpayer from expenditure which cannot be justified. In the present case the accused was served with an order under section 30 of the Indian Police Act of 1861 directing him and the other conveners of a meeting to apply for a license. They did not apply for a license, and when there were preparations to hold the meeting without it the accused attempted to harangue a crowd which had collected, and was promptly arrested. The facts are given fully and clearly in the judgment of the learned City Magistrate and the only question that arises in revision is whether the Parshottam Das Park can be held to be a "public road", "street" or "thoroughfare"

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within the meaning of those words as used in section 30 of the Police Act. The accused was actually convicted under section 32 of the Act for having disobeyed the order passed under section 30, and as he undoubtedly disobeyed the order the question is whether that order was *ultra vires* or not. If the Parshottam Das Park cannot be held to be a public "thoroughfare" the conviction must be held to be invalid.

The learned Magistrate has pointed out that the park is a public place, being maintained by the municipality for the benefit of the public, and according to his dictionary a "thoroughfare" is defined as "a way by which people pass". The park contains two gates with paths leading from one to the other and is surrounded on all sides by important roads, so that people do pass through it. He, therefore, concluded that "the park or at any rate the paths through it come within the strict definition of a thoroughfare, though I agree that this is not exactly the everyday way in which one uses the word." He further went on to say that in the order issued by the police under section 30 the words "Parshottam Das Park" were used as a convenient way of describing the central point of the proposed meeting and "must be presumed to include the immediately adjoining roads by which people had to arrive and on to which the meeting was likely to overflow." The orders, however, related to the Parshottam Das Park, and if the meeting were held or an attempt were made to hold it on adjoining roads and not in the park itself, I think it is clear that the order under section 30 could not be applied. However, the question is whether the order itself was *ultra vires*, and on this point, after hearing counsel on both sides and considering the matter to the best of my ability, I have come to the conclusion that I cannot agree with the Magistrate.

There may be a public right of way through the Parshottam Das Park, but this has not been proved one

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way or the other. I understand that the Municipal Board have powers to close the park to the public on certain conditions. It is certain, however, that the park is not intended to be exclusively used as a thoroughfare, or as a way by which people pass, and this is not its chief or primary object. It is no doubt a public place, but section 30 of the Police Act does not refer to a public place. Presumably the park contains grass, flower beds, etc., and although the public may have a right to walk through it, it does not follow from that that they have a right to play on the grass or to trample on the flowers, and an order that would apply to the paths would not necessarily apply to the grass and the flowers and the other parts of the park, nor would orders that would prevent the abuse of the grass and the flowers necessarily affect the paths. It cannot in fact be said that the whole of the park is a thoroughfare, and in my opinion the police authorities were not justified by law in calling the whole of the park a thoroughfare and in issuing an order under section 30 relating to the whole park on the ground that it was a public thoroughfare. If there were any doubt on the point it was the duty of the court to give the benefit of the doubt to the accused and not to the prosecution. I must, therefore, allow the revision, and I set aside the order of conviction and the sentence passed by the Magistrate. The fine, if paid, will be refunded.

Before Mr. Justice Kendall

1933
May, 30

RAM KALI *v.* KRIPA SHANKAR AND OTHERS*

Criminal Procedure Code, sections 133, 139*A*—*Obstructing alleged public way—Owner of land putting up turnstiles thereon—Ownership* prima facie *evidence against existence of public right of way—Order to remove turnstiles passed without proof of right of way—Criminal Procedure Code, section* 537—*Irregularity of procedure—Prejudice.*

The owner of a plot of land having put up turnstiles obstructing a path across the land, certain persons who alleged that there was a public right of way over the path initiated proceedings under section 133 of the Criminal Procedure Code. Notice under that section was issued to the owner, who put in appearance under section 135 (*b*) and filed a written statement and title deeds. A date was fixed for hearing evidence, but without hearing any evidence or arguments the Magistrate passed an order absolute under section 137 for the removal of the turnstiles, although he had not arrived at a definite decision as to the existence of a public right of way.

Held, in revision, that the procedure of the Magistrate was not according to law. After appearance was made by the owner, the next step which the Magistrate had to take was that set forth in section 139A, and the fact of ownership of the land undoubtedly provided "reliable evidence" within the meaning of clause (2) of that section in support of the denial of existence of a public right of way, in the absence of cogent evidence on the other side; accordingly the Magistrate was bound to stay the proceedings until the question should be decided by a competent civil court.

No doubt the jurisdiction of the criminal court to take proceedings under section 133 is not ousted by the mere fact that the person proceeded against is the owner of the land; but although the Magistrate had jurisdiction to initiate the proceedings, yet as he was betrayed by an error in procedure into coming to a decision which could only be pronounced properly by a civil court, the result undoubtedly did prejudice the present applicant, the owner; for the result was an order

*Criminal Revision No. 145 of 1933, from an order of G. O. Allen, Sessions Judge of Bareilly, dated the 3rd of November, 1932.

compelling the owner to remove the turnstiles set up on her own land, without any authoritative decision that she had been obstructing a public way. The irregularity in procedure could not, therefore, be cured under section 537 of the Criminal Procedure Code. The order of the Magistrate was *ultra vires*.

Mr. *Saila Nath Mukerji*, for the applicant.

Mr. *G. S. Pathak*, for the opposite parties.

KENDALL, J. :—The present application is made by one Mst. Ram Kali for the revision of an order passed by a first class Magistrate of Bareilly in a case under section 133 of the Code of Criminal Procedure. Briefly the facts are that Mst. Ram Kali had put up some turnstiles on a plot of land which admittedly is her property, and thus obstructed a route or path which passes over her land to a temple known as Tapeshwarnath temple. An application under section 133 of the Code of Criminal Procedure was made to the Magistrate by the managing committee of the temple and a number of residents of the locality, consisting mostly of railway employees living in the railway quarters in that neighbourhood, and the procedure adopted by the Magistrate was as follows. The application having been made on the 13th of January, 1932, he inspected the locality on 15th January, and apparently had some conversation with the parties. On 19th February certain documents were filed on behalf of Mst. Ram Kali. A notice under section 133 of the Code of Criminal Procedure was issued to her on 26th February, and 4th March was the date fixed for objections, or to be more accurate, for appearance under clause (*b*) of section 135. A written statement was filed on behalf of Mst. Ram Kali on 21st March (an adjournment from the 4th having been obtained), and the Magistrate then fixed another date, 12th April, for the hearing of evidence. On that date neither evidence nor arguments were heard, but on a subsequent date, namely on the 10th June, the Magistrate passed an

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order, which is now the subject of this revision, going into the merits of the case; that is to say, he referred to the documents filed by either party and to his local inspection, and concluding that as the path or road which was the subject of dispute was the only regular approach to the temple for the large number of railway employees living in the quarters, it was but just and proper that the order to remove the turnstiles should be made absolute. An application for revision to the learned Sessions Judge was rejected.

After the original order or notice under section 133 had been issued to Mst. Ram Kali it was necessary for her to appear under clause (*b*) of section 135, and it is not denied that appearance was made on her behalf. The next step which the Magistrate had to take was that set forth in section 139A of the Code of Criminal Procedure. He had to question Mst. Ram Kali or her representative as to whether she denied the existence of the public way, and, if she did, he had to inquire into the matter, and if he found that there was any reliable evidence in support of her denial he was bound to stay the proceedings until the question should be decided by a competent civil court. If on the other hand he found that there was no reliable evidence in support of her denial, he had to proceed under section 137 of the Code of Criminal Procedure and pass orders accordingly.

The procedure of the Magistrate in the case was not according to law, but the Sessions Judge seems to have considered that it was sufficiently correct to justify the order passed.

Now it is beyond controversy that the owner of land has a right to put up turnstiles on that land, and the Magistrate has no power to order him to remove the turnstiles unless he has, by so doing, obstructed a public way. If it is claimed that there is a public

right of way over the land of any person, and there is no judicial pronouncement on the point, it will in most cases be conceded that the owner of the land has at any rate an arguable case in a civil court. I do not suggest that the jurisdiction of the criminal court is ousted by the fact that the person proceeded against is the owner of the land, but at any rate the fact of ownership is a very solid fact, and in the majority of cases will undoubtedly provide "reliable evidence" within the meaning of clause (2) to section 139A, in the absence of very cogent evidence on the other side. In the present case there was no judicial pronouncement of the existence of a right of way, and the only evidence that the Magistrate had, apart from his own observations which were not reduced to writing, was a map and judgment of the year 1908 relating to some Land Acquisition proceedings in which the existence of a right of way was not one of the matters in issue and the land concerned was not the same as that now in dispute. The admissibility or at any rate the value of this evidence in the present proceedings has been challenged, and might well prove to be a matter of some controversy. The map and the judgment are, however, part of the evidence on which the Magistrate has relied.

The main objection that has been taken to the proceedings of the Magistrate is that he did not hold any proceedings under section 139A at all, but that leaving out that most necessary step he proceeded to adjudicate on the matter finally under section 137, and by so doing improperly arrogated to himself the functions of a civil court. I have been asked on the other side to hold that the proceedings of the Magistrate were really proceedings under section 139A, and that if there was any irregularity it can be cured under section 537 of the Code of Criminal Procedure on the ground that there has been no prejudice to the present applicant. In this connection I have been referred to a recent

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decision by a Full Bench of this Court, namely the case of *Kapoor Chand* v. *Suraj Prasad* (1).

I can dispose of this last point very shortly. The decision of the Full Bench is certainly an authority for holding that when the Magistrate has jurisdiction—which arises from the fact that he has received certain information and that he is satisfied as to the truth of that information—an irregularity in his proceedings need not vitiate them altogether, provided that the accused is not prejudiced. Assuming in the present case that the Magistrate had jurisdiction to initiate proceedings, I am satisfied that if he was betrayed by an error in procedure into coming to a decision which could only be pronounced properly by a civil court, the result undoubtedly did prejudice the present applicant, for the result is an order compelling the applicant to remove turnstiles set up on her own land, without any authoritative decision that she has been obstructing a public way.

I think that the other contention made on behalf of the opposite party, namely, that the proceedings of the Magistrate were really proceedings under section 139A, is also fallacious. The order of the 10th of June, 1932, appears to me to be undoubtedly an attempt to solve the issues raised in the case after a review of the evidence produced on both sides. It does not merely provide an answer to the question of whether Mst. Ram Kali had reliable evidence on which to base her denial of the existence of a public way. As I have already said, her evidence was her title deed, in which there is no mention of the existence of the right of way. The evidence on the other side has been weighed against this and the question has been decided apparently with a view to the equities of the case as affecting those members of the railway community who make use of the temple. There was, however, a

(1) (1933) I.L.R., 55 All., 301.

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definite legal question for decision, and that was whether a public right of way existed over this land. There is no definite decision on this point, and the order of the Magistrate is, therefore, *ultra vires*.

I, therefore, allow the application and set aside the order of the Magistrate. It is not necessary for me to pass any further order, because it will be necessary for any person who wishes to have a pronouncement on the existence of a public right of way to obtain a decision in the civil court.

APPELLATE CRIMINAL

Before Mr. Justice Kendall

EMPEROR *v.* JAGDAMBA PRASAD AND OTHERS*

1933
June, 8

Indian Penal Code, sections 366A, 498—Charge under former section, conviction under latter—Complaint by husband indispensable for such conviction—Criminal Procedure Code, sections 199, 238—Husband's giving evidence for prosecution under section 366A can not take the place of a complaint by him under section 498.

Where an accused is tried on a charge under section 366A of the Indian Penal Code he can not be convicted of an offence under section 498 of the Code in the absence of a complaint made by the husband under that section. The fact that the husband appeared and gave evidence for the prosecution at the trial under section 366A can not take the place of a complaint by the husband which is necessary.

Mr. *P. M. L. Verma*, for the appellants.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

KENDALL, J.:—This is an appeal by Jagdamba Prasad, Babu Ram, Ganga Sahai and Uman Shanker against their convictions by the Additional Sessions Judge of Aligarh of an offence under section 498 of the Indian Penal Code and their sentences to various

*Criminal Appeal No. 1170 of 1932, from an order of Sarup Narain, Additional Sessions Judge of Etah, dated the 10th of December, 1932.

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terms of imprisonment under that section. The appeal must be allowed on a legal ground which finds no place in the memorandum of appeal. The appellants were prosecuted by the police as a result of a report which was made under section 366A of the Indian Penal Code, and they were charged under that section. They have, however, been convicted under section 498, although no complaint was made by the husbands of the women in respect of whom the offence is said to have been committed, as required by section 199 of the Code of Criminal Procedure.

This difficulty was considered by the learned Additional Sessions Judge, who overruled the objection raised on behalf of the appellants, holding that as there had been a report under section 366A of the Indian Penal Code and as the husbands had come forward to give evidence, the apparent defect in procedure had been cured. In coming to this decision he relied on the case of *Jatra Shekh* v. *Reazat Shekh* (1) and also a recent decision by a single Judge of this Court. In the case of *Empress of India* v. *Kallu* (2) it was held by a single Judge of this Court that where the accused had been prosecuted for rape, it was not open to the court to convict him of adultery when no complaint of adultery had been made by the husband. In the course of that decision STRAIGHT, J., remarked: "It by no means follows as a necessary consequence, that because a husband may wish to punish a person who has committed rape upon his wife, that is, who has had connection with her against her consent, he will desire to continue proceedings when it turns out that she has been a willing and consenting party to the act." The same process of reasoning applies where a report has been made of abduction and the offence found to have been committed is not abduction but only the minor offence under section 498 of the Indian Penal Code.

(1) (1892) I.L.R., 20 Cal., 483. (2) (1882) I.L.R., 5 All., 233.

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EMPEROR v. JAGDAMBA PRASAD

In section 238 of the Code of Criminal Procedure it has been laid down that where a person is charged with a major offence but the evidence only proves the commission of a minor offence, he may be convicted of the minor offence although he is not charged with it. But in clause (3) an exception is made to this general rule, namely, "Nothing in this section shall be deemed to authorize a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section." The decision of the Calcutta Bench which has been relied on by the Sessions Judge has not been followed in a later case, namely *Chemon Garo* v. *Emperor* (1), where it was decided that when a person has been committed to sessions on a charge preferred by a husband under section 376 of the Indian Penal Code and the husband appears as a witness for the prosecution of the offence of rape, it could not be held that he had made a complaint of adultery within the meaning of section 199 of the Code of Criminal Procedure, and that the court could not convict the accused under section 497 of the Indian Penal Code. Subsequently a Full Bench of the Calcutta High Court in the case of *Tara Prosad Laha* v. *Emperor* (2) gave judgment on the two questions referred to them, namely (1) Is the word "complaint" in section 199 of the Code of Criminal Procedure limited to "complaint" as defined in section 4 of the Code of Criminal Procedure? and (2) Where a complaint is made by a husband of an offence under section 366 or 376 of the Indian Penal Code, can a charge be added and a conviction be had under section 498 of the Indian Penal Code? The first question was decided by the Bench in the affirmative, and it followed, therefore, that the second had to be answered in the negative. A similar view has been taken by the Madras High Court in the case of

(1) (1902) I.L.R., 29 Cal., 415. (2) (1903) I.L.R., 30 Cal., 910.

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Bangaru Asari v. *Emperor* (1) by a Bench of the Madras High Court, in which the decision of STRAIGHT, J., in *Empress of India* v. *Kallu* (2) was followed and approved. I have not been referred to any decision of a Bench of the Allahabad High Court on the exact point raised in the present case, but the preponderance of authority both of the High Courts of Calcutta and Madras is strongly in favour of the present appellants, and though single Judges of this Court have not always followed the decision of STRAIGHT, J., in *Empress of India* v. *Kallu* (2), I feel that I am fully justified in holding that it may be considered still to be good law.

The appeal is, therefore, allowed on this legal ground, and it is unnecessary for me to consider the facts of the case. I set aside the order of conviction and the sentences passed by the Additional Sessions Judge, and direct that the appellants be acquitted and released. As they are on bail, their sureties may be discharged.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King

1933
July, 17

IN THE MATTER OF BURMAH SHELL OIL STORAGE AND DISTRIBUTING COMPANY OF INDIA, LIMITED*

Stamp Act (II of 1899), section 2(16) and article 35(a)(iv)—"Lease"—Undertaking in writing to occupy immovable property—Construction of document—Lease or license—Whether exclusive possession and enjoyment given.

Under a bilateral agreement in writing, called an agreement of license, between the Secretary of State for India and the Burmah Shell Oil Storage Company the company was to have the use and occupation of certain railway land belonging to the State, for the purpose of constructing a petroleum storage installation. The company had to pay a certain amount

*Miscellaneous Case No. 124 of 1933.

(1) (1903) I.L.R., 27 Mad., 61. (2) (1882) I.L.R., 5 All., 233.

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monthly for the use of the plot, without any right of transfer or subletting. The company was to erect certain substantial constructions of a permanent character on the land, and allow certain officials of the railway access to the land at any time for inspection of the condition of the buildings. In case of breach of any of the conditions by the company the "license" could be determined by giving seven days' notice; also either party was at liberty to determine it by giving three months' notice at any time. The deed expressly provided that nothing contained in it should be construed to create a tenancy. The question arose whether the deed was chargeable with stamp duty as a lease or was exempt from stamp duty as creating a mere license.

Held that the document in question was a lease within the definition in section 2(16), clause (*b*) of the Stamp Act, as it was an undertaking in writing to occupy immovable property and was not a counterpart of a lease, and was therefore chargeable with stamp duty under article 35(*a*)(*iv*) of schedule I of the Stamp Act.

The definition of "lease" as contained in the Stamp Act is wider and more comprehensive than the definition in the Transfer of Property Act and includes transactions which may not amount to a lease under the latter Act.

Per SULAIMAN, C. J.—So long as the transaction remained in force the Oil Company had exclusive possession and enjoyment of the land, the only restriction being that it was bound to allow the railway officers to inspect the premises. This was obvious from the fact that the company was to put up a substantial building of a permanent character, and after the construction of the building the actual possession of the land could not remain with the railway administration, only their officer was allowed access for purposes of inspection. The transaction, therefore, was not a mere license as defined in section 52 of the Easements Act, as a license does not confer exclusive possession and enjoyment. The document, therefore, was not exempt from stamp duty as being a license.

Per MUKERJI, J.—If the document comes within the definition of the word "lease" contained in the Stamp Act, it must be held chargeable with stamp duty as a lease, although it may also be held that the transaction would be a license within the meaning of section 52 of the Easements Act.

Mr. *Muhammad Ismail* (Government Advocate), for the Crown.

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Mr. *Ladli Prasad Zutshi*, for the Company.

SULAIMAN, C. J. :—This is a reference by the Board of Revenue under section 57 of the Indian Stamp Act (Act II of 1899) for the expression of an opinion as to whether the document in question is chargeable as a lease under article 35(*a*)(*iv*), schedule I, of the Stamp Act or an indemnity bond or an agreement chargeable with less duty.

It appears that an agreement was executed on a blank paper on behalf of the Secretary of State which was also signed by the representative of the Burmah Shell Oil Storage and Distributing Company of India, Limited, and was dated the 7th of September, 1931. Under this document the Oil Company, which is called the licensee throughout, was to have the temporary use or occupation of a piece of land at Roorkee, solely and entirely for the purpose of constructing and maintaining thereon a petroleum installation for the storage of petroleum etc.; the company was forthwith to erect on part of the said land a petroleum installation at its own cost capable of holding, in the case of existing installation, not less than 5,000 gallons, and in the case of new installations not less than 6,500 gallons, of petroleum in bulk; the company was, however, bound, before proceeding to construct any building or other structure or works in connection with the said land, to supply detailed plans and specifications to the railway authorities for approval, but after such approval the company had forthwith to proceed with the erection and construction of the said petroleum installation or other works as sanctioned. The company was however bound to allow the Divisional Superintendent or any other authorised officer of the railway administration free access at all times to the said land and to the petroleum installation and all other buildings and works, etc., and was bound, whenever so requested by such officer, to rebuild, replace or repair buildings and other works, etc., which were considered by him to be improperly situated

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or to be of defective design or construction or in want of repair. The company was to pay to the railway administration a sum of Rs.214-8, at the rate of Rs.2-8 per thousand square feet, every month or part thereof in return for the use of the plot of land occupied by the company; such payment was considered to be due and payable each and every year in advance within the first week of that year and the company was also to pay all local cesses, rates and taxes which might be payable in respect of the land and the installation buildings and works, etc. There was a provision that the company shall not transfer or sublet or in any way part with the privileges conferred upon the company; and then there were also provisions regulating the sale of petroleum, its carriage and storage, with which we are not concerned. Paragraph 11 provided that in the event of the company being guilty of breach of any of the provisions of the document it would be lawful for the railway administration to determine and cancel the license upon seven clear days' written notice and at the expiration of the period of such notice the license was to be determined and cancelled unless the notice was previously revoked. Paragraph 12 provided that these privileges were granted on the express understanding that either party would be at liberty to determine and put an end to this transaction by giving to the other of them at any time three months' notice.

Paragraph 13, on which great reliance is placed on behalf of the company, stated that nothing contained in the document should be construed to create a tenancy in favour of the company or to prejudice or affect the rights and powers of the railway administration in and over and in relation to the said land and the use and enjoyment thereof and the exercise by the licensee of the liberties and licenses thereby granted. It then proceeded to state that the railway administration would have full and absolute power from time to time to direct in what manner such liberties and licenses should be exercised and

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enjoyed and that the company would not be at liberty to exercise the said liberties and licenses otherwise than in such manner as the administration shall from time to time direct. It then provided that on the determination of the license the railway administration would re-enter upon and re-take and absolutely retain possession of the land. The company was at all times to keep the administration indemnified against and to reimburse to the administration all claims, demands, damages, etc., which the administration may have to sustain or incur.

Last of all the document provided that the company was to pay the cost of the preparation, stamping, execution and registration.

As pointed out above, the document was never stamped but was presented for registration. The sole question for consideration before us is whether this document created a mere license in favour of the Oil Company, so as to be exempt from stamp duty.

There is no doubt that we have to consider the provisions of the Stamp Act for the purpose of answering this question. License is not defined in the Stamp Act at all, but it is defined in section 52 of the Easements Act as follows: "Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license." It is obvious that in the absence of any other definition of "license", the definition of it as contained in the Easements Act might well be adopted. *Prima facie*, a license merely grants a right to do or permit to do something, which would otherwise be unlawful, upon an immovable property. Obviously it is not a transfer of any interest in immovable property, nor *prima facie* is it a transfer of a right to exclusive possession over that property. It is equally clear that a right

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cannot amount to a license if it falls under the definition of an easement or amounts to an interest in the immovable property itself.

"Lease" is defined both in the Transfer of Property Act and in the Stamp Act. Under section 105 of the Transfer of Property Act a lease is a transfer of a right to enjoy immovable property made for a certain time, express or implied, or in perpetuity in consideration of a price paid or promised, etc. If we had to go entirely by the definition of "lease" as contained in section 105, it may be difficult to hold that a transaction amounts to a lease when there is no transfer of a right to enjoy the property for a certain time. But section 2, sub-section (16) of the Indian Stamp Act, while presumably borrowing the definition of "lease" as contained in the Transfer of Property Act, adds thereto a provision that "lease" shall include also, among other things, a qabuliat or other undertaking in writing (not being a counterpart of a lease), to cultivate, occupy or pay or deliver rent for, immovable property.

The use of the words "include also" obviously implies that the definition of "lease" as contained in the Stamp Act is wider and more comprehensive than the definition of it in section 105 of the Transfer of Property Act. It would follow that even if a transaction does not amount to a lease under section 105 of the latter Act, it may nevertheless be a lease for the purposes of the Stamp Act.

No doubt the parties call this document an agreement by way of license, and throughout that document the same phraseology has been used and the parties are called licensor and licensee. There is also a clear statement that this deed should not be construed to create a tenancy in favour of the Oil Company. It is, however, clear that such recitals in a document can never be conclusive, and we have to look to the substance of the terms agreed upon and not to the nomenclature given to the deed by the parties.

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In many cases the distinction between a license and a lease is a very narrow and thin one and there may be considerable difficulty in deciding whether a transaction amounts to a lease or a license. There are many points which make this transaction resemble a lease. On the other hand, there are others which make it resemble a license. We have already noticed that there is no right to transfer or sublet or in any way part with the privileges conferred by this document and that the transaction was to be determined and cancelled at very short notice and there was to be a right of free access for all time to the land in favour of the Divisional Superintendent or any other authorised officer of the railway administration. On the other hand, there is no doubt that the use and occupation of the land during the period when this transaction was to remain in force were transferred to the Oil Company, and they were forthwith to erect on a part of the land a building or other structure of a substantial and permanent character, and when the transaction was to be terminated the railway administration had the right to re-enter upon, re-take and absolutely retain the possession of the said land. The provision in paragraph 13 is *prima facie* inconsistent with the provision in paragraph 1 of the agreement; but on comparison of the different phraseologies used at the two places it seems that they are not necessarily contradictory. While temporary use and occupation were handed over to the Oil Company, the railway administration retained their rights and powers in and over and in relation to the use and enjoyment of the land and full and absolute power to give directions in what manner the liberties and privileges would be exercised, that is to say, the control was retained by the railway administration but the use and occupation were certainly transferred to the Oil Company. This is obvious from the fact that the company was to put up a substantial building of a permanent character and after the construction of the building the actual possession of the land could not

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remain with the railway administration, only their officer was allowed access to the land for the purposes of inspection.

In view of these provisions it is quite clear that so long as the transaction remained in force and was not terminated and the Oil Company was not ejected and the railway administration did not re-enter, the former had exclusive possession and enjoyment of the land for the time being, the only restriction being that they were bound to allow the railway officers to inspect the premises. On this view of the terms of the document alone the transaction would not be a mere license within the scope of section 52 of the Indian Easements Act, as a license does not confer exclusive possession and enjoyment.

As pointed out above, the definition of "lease" in the Stamp Act, which does not contain any definition of "license" at all, is wide enough to include the present transaction. If there was an undertaking on the part of the Oil Company in writing, which was not a counterpart of a lease, and the undertaking was to occupy or pay or deliver rent for immovable property, the document would be a lease of an immovable property within the meaning of the Stamp Act and would therefore be liable to stamp duty. The learned advocate for the company has urged that section 2, sub-section (16), sub-clause (*b*) contemplates a case where there is not a composite agreement signed by both the lessor and the lessee, but only a unilateral agreement signed by the lessee in the form of qabuliat or a counterpart of a lease. This contention cannot be accepted because the undertaking referred to therein has to be other than a counterpart of a lease and it need not necessarily be the qabuliat which is expressly mentioned. It is also obvious that the mere fact that the lessor also is a party to the same document and has signed it would not take it outside the scope of the sub-clause.

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In the present case the Oil Company which had the use and occupation of the land was bound forthwith to erect on a part of the said land a petroleum installation and to maintain the building and the structures in proper condition and take necessary precautions and safeguards. Even if they did not actually occupy the land, they were liable to make periodical payments. It is therefore very difficult to say that this document did not amount to an undertaking in writing to occupy an immovable property.

Great reliance has been placed on the Full Bench case of *Board of Revenue* v. *South Indian Railway Company* (1) in which the agreement was somewhat similar. But there the right given by the railway company to the municipal council was for the purpose of storing coal imported by the municipality on the land in the possession of the company. It also appears that the railway company had no authority whatsoever to grant a lease of the land and could grant only a license for it. The municipal council was not to put up any construction of a permanent character on the land, although there was a fixed amount called rent which was payable by the municipal council. The case came under the Stamp Act, apparently amended by a Local Act of the Madras Presidency. Unfortunately the amended Act is not before us, and it is not possible to verify the references to the various sections in it, which do not exactly tally with the Stamp Act which we have to consider. But the learned CHIEF JUSTICE, with whose view the other learned Judges agreed, laid emphasis on the circumstance that the railway company was prohibited by orders of the Government of India from executing leases of land in their possession and considered that circumstance important for the purpose of understanding the intention of the framers of the document.

KRISHNAN, J., in addition also thought that the case would not fall under section 2(16) of the Stamp Act as it

(1) (1924) I.L.R., 48 Mad. 368.

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could not be said that there was an undertaking in writing to occupy or pay or deliver rent for the immovable property. The learned Judges considered that the use of the word "rent" in the document before them was unfortunate and unhappy and the word was not used in the same sense as it was used in the statute itself.

A right to store coal on a piece of land without a right to put up a building thereon is very much in the nature of a mere license, and it may well be said that there is no right to occupy the land in the sense of retaining exclusive possession over it but it is a mere right to use the land for that purpose. That case is therefore clearly distinguishable from the case before us. Here the use and occupation were transferred and there could not be a simultaneous possession exercised by the railway administration when a substantial building was put up on the land. There was also an undertaking by the Oil Company to occupy the land and make payments in the nature of rent.

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In my opinion, therefore, the document in question is a lease within the definition of that term under section 2, sub-section (16), clause (*b*) and is therefore chargeable as a lease under article 35(*a*)(*iv*) of schedule I.

MUKERJI, J. :—I entirely agree that the document in question is a lease within the definition of that term to be found in the Indian Stamp Act, 1899, section 2(16) and should have been stamped in accordance with schedule I, article 35, clause (*a*), sub-clause (*iv*).

The language of the agreement has been noticed at length by the learned CHIEF JUSTICE and I do not feel called upon to re-state the purport of the same. Briefly, a company dealing with petroleum and enjoying a very big name, obtained land from a railway administration for the purpose of storing on it petroleum. The company agreed to pay a certain sum of money, monthly, for the benefit derived, namely use and occupation of the land. The question is whether an agreement like this

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should be at all stamped, and if so, under what rule of law.

In my opinion the answer to the question should be looked for in the Stamp Act, and the Stamp Act alone. It is true that the term "lease" has been defined in the Transfer of Property Act and that the term "license", as defined in the Indian Easements Act, finds no place in the Stamp Act. It is not for me to find out the reason why different definitions have been provided in the Stamp Act and in the Transfer of Property Act for the term "lease" and why the word "license" has not found any place in the Stamp Act. It may be that for the purposes of levying duty the legislature thought it necessary to charge certain documents and not to charge certain others. We have to read the mind of the legislature only through the language employed by it and not by speculation.

If we read the Stamp Act and if we find that the document comes within the definition of the word "lease", we must hold that the document is chargeable with duty even if we should also hold that the transaction would be a license within the meaning of section 52 of the Indian Easements Act. It is possible, nay it is probable, that it was in the mind of the legislature to levy a duty where a transaction, which was a mere license under the Easements Act, was reduced to writing, and that therefore it did not think it necessary to define the word "license". The transaction fell within the widened definition of the word "lease".

In the Stamp Act the term "lease" is described in several ways. First of all, it is said that lease means a lease of immovable property, and this, presumably, means a lease which is a lease within the meaning of the Transfer of Property Act. Then the Act says that it includes "patta", a term which is not again defined. Then it says that a lease includes ". . . . . undertaking in writing . . . . . .to . . . .occupy . . .

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immovable property." We need not go further, for in my opinion the agreement before us comes clearly within the language quoted above. This is a document by which the Petroleum Company gave an undertaking in writing to occupy immovable property. Now this document is not a counterpart of a lease, because there is no separate lease. The reason why counterparts of a lease have been exempted from the definition is that counterparts are separately provided for, where the original or the principal document is properly stamped; *vide* Stamp Act, schedule I, article 25. The document before us has been signed both by the grantor and the grantee (I am using expressions which cannot be taken exception to). There being no patta or a lease, the document is not a counterpart of a lease. It is simply an undertaking in writing to occupy an immovable property. In this view, whether the transaction is a mere license within the meaning of section 52 of the Indian Easements Act or whether it is a lease within the meaning of the Transfer of Property Act, for purposes of stamp duty, it is chargeable. As it is not for any definite term, the duty chargeable is the duty laid down in schedule I, article 35, clause (*a*), sub-clause (*iv*).

The learned counsel for the company has strongly relied on a Madras decision, namely *Board of Revenue* v. *South Indian Railway Company* (1). The decision is certainly in conflict with the opinion expressed above and I would, with the greatest respect, dissent from that judgment. A difficulty has arisen in interpreting that judgment because of the reference to some Act which is not before us. The Stamp Act which we have got before us does not mention a "lease" in schedule I, article 30. Two of the learned Judges did not consider the definition of "lease" to be found in the Indian Stamp Act and the learned third Judge seems to hold that the word "lease" as stated in the Stamp Act must be a lease as defined in the Transfer of Property Act, and a license for the

(1) (1924) I.L.R., 48 Mad., 368.

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purposes of stamp duty must be the license as defined in the Easements Act. In my view we should not look into either the Transfer of Property Act or the Easements Act. We should confine our attention to the definition given in the Stamp Act and the Stamp Act alone.

For the reasons given above I concur in the opinion expressed by the learned CHIEF JUSTICE.

KING, J. :—I also agree. In my opinion the document in question is clearly an undertaking in writing to occupy immovable property, and is not a counterpart of a lease, and must therefore be treated as a lease for the purposes of the Indian Stamp Act.

BY THE COURT :—The document in question is a lease and is chargeable with duty under article 35(*a*)(*iv*) of schedule I.

REVISIONAL CRIMINAL

Before Mr. Justice Kendall

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DHONDHA KANDOO *v.* SITARAM AND OTHERS*

Criminal Procedure Code, sections 258(1), 366 *and* 367—*Magistrate acquitting the accused without writing a judgment except a note on the order sheet—Judgment written a month later—Irregularity—No miscarriage of justice—Criminal Procedure Code, section* 537.

In a case under section 325 of the Indian Penal Code the trying Magistrate acquitted the accused, without writing and delivering any judgment, but merely recording an informal order of acquittal on the order sheet. On an application in revision being made to the District Magistrate, he directed the trying Magistrate to write and pronounce a judgment; and thereupon the latter wrote a judgment of acquittal, reviewing the facts of the case and discussing the evidence; this was done about a month after the accused had been acquitted. *Held* that the procedure of the Magistrate in directing the accused to be acquitted without writing a judgment was undoubtedly

*Criminal Revision No. 222 of 1933, from an order of Faiyaz Husain Rizwi, Magistrate, second class, of Azamgarh, dated the 19th of January, 1933.

irregular; but the question was whether the irregularity was such as could be cured under section 537 of the Criminal Procedure Code and the question would depend upon whether or not there had been a failure of justice owing to the irregularity. In the present case, as the Magistrate when he did come to write and pronounce judgment was of the same opinion as he had been when he directed by an informal order the accused to be acquitted, and as he had given his reasons for that opinion based on the evidence in the case, it could not be held that there had been any miscarriage of justice.

Queen-Empress v. *Hargobind Singh* (1), distinguished.

Mr. *Sailanath Mukerji*, for the applicant.

Mr. *K. L. Misra*, for the opposite parties.

KENDALL, J. :—This is an application for the revision of an order of the District Magistrate of Azamgarh, directing a second class Magistrate to write and pronounce judgment in a case which had been tried by him. The circumstances are that a case under section 325 of the Indian Penal Code had been instituted in the court of the Magistrate, who passed an order on the 21st of December, 1932, on the order sheet to the effect that final orders would be passed on December the 23rd. On that date the Magistrate merely wrote an informal order on the order sheet acquitting the accused without delivering a judgment at all. An application for revision was filed in the court of the District Magistrate, who recorded an order that he would look into the matter on inspecting the tahsil, and his order of January the 13th which is the subject of the present application was apparently written during the inspection of the tahsil, but must be regarded as an order passed on the present application to him for revision.

It is argued in support of the present application that the proceedings of the Magistrate were irregular in that he acquitted the accused in the case without writing a judgment. He did, however, subsequently write a judgment dated January the 19th, in accordance with the order of the District Magistrate, in which he reviewed

(1) (1892) I.L.R., 14 All., 242.

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the facts of the case and discussed the evidence. The proceedings are therefore complete. Mr. *S. N. Mukerji* has quoted two decisions on which he bases his argument that the order of the District Magistrate should be set aside and that a re-trial should be ordered. Such a course would entail not only the setting aside of the order of the District Magistrate but also the judgment of the Tahsildar Magistrate recorded and pronounced on January the 19th and the order of acquittal, which may or may not be regarded as an order passed under section 258(1) of the Code of Criminal Procedure, which was recorded on December the 23rd, 1932. In the case of *Queen-Empress* v. *Hargobind Singh* (1) it was held by a Full Bench of this Court that "A sentence which has been passed or a direction that an accused be set at liberty which has been given at a sessions trial before the judgment required by section 367 of the Code of Criminal Procedure of 1882 has been written is illegal." In that case the Sessions Judge without writing a proper judgment had recorded an order directing the four persons accused to be hanged under section 302 of the Indian Penal Code. In setting aside that order and directing a re-trial the Full Bench remarked (at page 272) :—

"Inasmuch as the sentence in the case of a conviction, and the direction to set the accused at liberty in the case of an acquittal, can only follow on the decision and cannot precede it and inasmuch as the decision must be contained in the written judgment, and there only, it necessarily follows that when, in cases like the present, to which section 367 applies, there is no written judgment when the sentence is passed, the sentence is illegal.

"The requirements of sections 366 and 367 are no mere matters of form. The provisions of those sections are based upon good and substantial grounds of public

(1) (1892) I.L.R., 14 All., 242.

policy, and whether they are or not, Sessions Judges must obey them and not be a law to themselves.

"Any Judge at the conclusion of the evidence in a case, some of which may be not quite distinct in his mind owing to the length of the trial, might pass sentence on a prisoner and find it impossible honestly afterwards to put on paper good reasons for having convicted him, or, on the other hand, might direct that the accused be set at liberty and find it impossible afterwards honestly to put on paper good reasons for the acquittal."

There is no reason to suppose that these remarks are not to be applied with equal force in the case of proceedings in the court of a Magistrate, at any rate in such cases as require the writing and pronouncement of a regular judgment in accordance with the provisions of sections 366 and 367 of the Code of Criminal Procedure. Warrant cases, for which the procedure is prescribed in chapter XXI of the Code, are such cases. In section 258(1) it is laid down that "If in any case under this chapter in which a charge has been framed the Magistrate finds the accused not guilty he shall record an order of acquittal." But the mode in which the order of acquittal is to be recorded is set forth in chapter XXVI.

Undoubtedly therefore the procedure of the Magistrate in directing the accused to be acquitted without writing a judgment was irregular. Mr. *Mukerji* has pointed out that the Magistrate apparently had no intention of writing a judgment at all until he was directed to do so by the District Magistrate, but this does not affect the merits of the case. The question I have to consider is whether the irregularity is such as can be cured under the provisions of section 537 of the Code of Criminal Procedure. In the case decided by the Full Bench of the Allahabad High Court to which I have referred above, it is obvious that the irregularity could

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not be cured and the same view was taken in the case of *Jhari Lal* v. *Emperor* (1). These were both cases in which the order which was held to be irregular was an order of conviction. There have been other cases, *Tilak Chandra Sarkar* v. *Baisagomoff* (2), also an order of conviction, in which it was held that the irregularity could be cured. A similar view was taken in the case of *Sankaralinga Mudaliar* v. *Narayana Mudalliar* (3), a sessions case, in which the Judge at the end of the trial informed the accused that they were acquitted, in order to save them from having the anxiety of the charge hanging over them for longer than was absolutely necessary, and gave his full reasons for the acquittal at another time. I am not prepared to say that in every case in which there has been an irregular order of acquittal such as the present one the irregularity could be cured under section 537 of the Code. It would depend on whether the Court could hold that there had or had not been a failure of justice owing to the irregularity. In the present case judgment was pronounced about one month after the end of the hearing, and if judgment had been merely reserved for that period there would have been no irregularity at all. The irregularity consisted of what appears to have been an informal order of acquittal before the judgment was written and pronounced, and as the Magistrate when he did come to write and pronounce judgment was of the same opinion as he had been when he directed the accused to be acquitted, and as he has given his reasons for that opinion based on the evidence in the case, I cannot hold that there has been any miscarriage of justice. The present application for revision is therefore dismissed. A copy of this order must however be sent to the Magistrate concerned, through the District Magistrate, for his information and guidance.

(1) A.I.R., 1930 Pat., 148. (2) (1896) I.L.R., 23 Cal., 502.
(3) A.I.R., 1922 Mad., 502.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King

MUHAMMAD HANIF AND OTHERS (JUDGMENT-DEBTORS) *v.* ALI RAZA (DECREE-HOLDER)*

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Civil Procedure Code, sections 141, 151—*Decree transferred to another court for execution—Judgment-debtor's objection allowed* ex parte—*Executing court certifying full satisfaction to transferring court—Inherent jurisdiction of the executing court thereafter to set aside the* ex parte *order and restore the proceedings—Jurisdiction.*

A decree was transferred to another court for execution and in that court the judgment-debtor objected that the decree had been adjusted under a private arrangement. On the day of hearing the decree-holder was absent and the objection was allowed *ex parte* and the executing court certified to the court which had passed the decree that the decree had been fully satisfied and that the case was disposed of. An application for setting aside the *ex parte* order was subsequently made by the decree-holder to the executing court and was allowed, and the execution proceedings were restored.

Held, in revision, that the court to which the decree was sent for execution had inherent jurisdiction to entertain and allow an application for the setting aside of its previous order passed *ex parte*. Although the provisions of order IX of the Civil Procedure Code could not be made applicable to execution proceedings by calling in the aid of section 141 of the Code, yet an application to set aside its own previous *ex parte* order was entertainable by the court under the inherent jurisdiction which the court possessed and which was preserved by section 151.

Held, further, that this not being a case of a further execution of the decree, which could not be ordered after the certificate of satisfaction had been sent to the original court, but a question as to whether a previous proceeding of the executing court should or should not be re-opened, the executing court had not become *functus officio* but had jurisdiction to entertain such a question. Moreover, in the present case the

*Civil Revision No. 505 of 1932, from an order of Maheshwar Prasad, Subordinate Judge of Allahabad, dated the 18th of June, 1932.

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decree-holder applied invoking the inherent jurisdiction of the court to set aside an *ex parte* order, to meet the ends of justice; and the proper court to entertain such an application was obviously the very court which had passed the *ex parte* order.

Messrs. *Shiva Prasad Sinha, Hyder Mehdi* and *Zafar Mehdi,* for the applicants.

Mr. *Ladli Prasad Zutshi,* for the opposite party.

SULAIMAN, C.J., MUKERJI and KING, JJ. :—This case has been referred to a Full Bench because it raises a substantial question of law requiring an authoritative pronouncement.

In 1928 a decree for a fairly large sum of money was passed in favour of the respondent, Ali Raza, against Muhammad Hanif and others, judgment-debtors, by the Subordinate Judge of Cawnpore. This decree was later on transferred to the Allahabad court for execution. An application for execution was made at Allahabad in January, 1929, to which the judgment-debtors in September, 1929, objected, pleading that the decree had been adjusted out of court under a private arrangement. More than one date had to be fixed for the hearing of the application. On the last date, namely the 31st of May, 1930, the decree-holder was absent and his pleader made a statement that he had no instructions to go on with the case. The court heard the objection and allowed it *ex parte*. It appears that the execution case was then struck off and a certificate was sent to the Cawnpore court stating that the decree had been fully satisfied and that the case had been disposed of. This certificate was not received at Cawnpore till the 28th of June, 1930. On the 25th of June, 1930, the decree-holder made an application before the court of Allahabad for the setting aside of the *ex parte* order, on the ground that he had been prevented by sufficient cause from not appearing on the date of hearing. The application professed to have been made under section 141, section 151 and order XLVII, rule 1 of the Civil Procedure Code. After

issuing notice and hearing objections of the judgment-debtors the court entertained the application, and having come to the conclusion that sufficient cause had been shown, set aside the previous *ex parte* order allowing the objection and dismissing the execution application, and the case has, therefore, been re-opened and is still pending.

The judgment-debtors have come up in revision to this Court and contend that the Allahabad court after having sent the certificate of satisfaction to the Cawnpore court, had ceased to have any jurisdiction over the case, and therefore the order passed by it setting aside its previous *ex parte* order was *ultra vires*. It is further urged that the order setting aside the previous order was not a proper order on its merits.

We cannot go into the question of the propriety of the order in revision. The sole question which arises for consideration before us is whether the Allahabad court had jurisdiction to set aside its previous order.

No doubt order IX of the Civil Procedure Code would not in terms apply to an application for execution proceedings. In view of the pronouncement of their Lordships of the Privy Council in the case of *Thakur Prasad* v. *Fakir-Ullah* (1) section 141 of the Civil Procedure Code does not apply to execution proceedings, and therefore order IX cannot be applicable to such proceedings with the aid of section 141.

But there is no doubt that the Allahabad court had inherent jurisdiction to set aside its own previous *ex parte* order if it were satisfied that it was necessary in the ends of justice. This view has been expressed in a number of cases in this Court. We may refer to the case of *Ganesh Prasad* v. *Bhagelu Ram* (2) where it was pointed out that although the application for restoration of the previous application dismissed for default does not fall under order IX by virtue of the provisions of section 141, such an

(1) (1894) I.L.R., 17 All., 106. (2) (1925) I.L.R., 47 All., 878.

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application is entertainable under the inherent jurisdiction which the court possesses and which is preserved by section 151 of the Civil Procedure Code. Similarly, in *Ram Chander* v. *Tej Singh* (1) it was held that where an application to set aside an *ex parte* decree is dismissed for default, an application for the restoration of such application can be made, and although order IX does not apply to such an application for restoration, the case falls under the inherent jurisdiction of the court. In *Yudhishtir Lal* v. *Fateh Singh* (2) although it was not considered necessary to decide whether section 141 of the Civil Procedure Code applied to an application for restoration of the previous application, it was clearly held that section 151 could be safely applied and that the court had jurisdiction to entertain such an application.

The learned advocate for the applicant contends that as soon as the executing court has reported to the court which passed the decree that the decree has been satisfied, it becomes *functus officio* and ceases to have any jurisdiction whatsoever to entertain any application in connection with the previous proceeding. He has relied on a number of cases which broadly lay down that the jurisdiction of the court to execute the decree ceases on the decree being satisfied and such satisfaction being reported to the court which passed the decree. These decisions adopt the language used by a Bench of this Court in *Abda Begam* v. *Muzaffar Husen Khan* (3) which was to the following effect: "In our opinion the court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the court which sent the decree, or has executed it so far as that court has been able to execute it within its jurisdiction and has certified that fact to the court which sent the decree, or until it has failed to execute the decree and has certified that fact to the court

(1) A.I.R., 1929 All., 906. (2) (1929) I.L.R., 51 All., 901.
(3) (1897) I.L.R, 20 All., 129.

which sent the decree." It will, however, be noted that the rule laid down in that case related to the question of the jurisdiction of the execution court to execute the decree further and not to any question of jurisdiction to entertain an application for review of judgment or for rectification of any mistake that may have been inadvertently committed. Indeed, in that case although an application for execution had been struck off by the executing court on the ground that it did not comply with the requirements of the law, not having supplied all the necessary particulars, and although a certificate had been sent to the court which had sent the decree for execution that the case had been struck off the file, it was held by the learned Judges that the executing court could entertain a fresh application for execution which was in proper form and which fulfilled the requirements of the law. The learned Judges relied on the Calcutta Full Bench case of *Bagram* v. *Wise* (1) as showing "that the court to which a decree is sent has, even after striking off an application for execution, as here, still jurisdiction in the matter of the execution." A Division Bench of the Calcutta High Court in *Manorath Das* v. *Ambika Kant Bose* (2) has naturally followed its own Full Bench ruling as well as the ruling of the Allahabad High Court in *Abda Begam's* case.

The case decided by a Division Bench of the Oudh Chief Court in *Musammat Jilai* v. *Abdul Rahman* (3) is somewhat similar to the case before us. There, there were several judgment-debtors whose properties were attached and sold by the execution court to which the decree had been transferred. After the case had been struck off on full satisfaction, some of the judgment-debtors discovered that although the claim had been dismissed against them, their property had been put up for sale. Instead of applying to the court under section 47 they filed regular suits for declaration of their title. The

(1) (1868) 1 Beng. L.R., (F.B.), 91. (2) (1909) 13 C.W.N., 533.
(3) A.I.R., 1929 Oudh, 76.

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Oudh Chief Court came to the conclusion that their proper remedy was to apply under section 47 of the Civil Procedure Code and that it was the execution court to which the decree had been transferred for execution which was a proper court for entertaining such an application. The learned Judges accordingly sent the case to that court with direction to treat the plaint as if it were an application under section 47 of the Civil Procedure Code. Agreeing with the decision of a single Judge of this Court in *Shiam Lal* v. *Koerpal* (1), they distinguished it on the ground that although the execution court may have ceased to have jurisdiction for the purpose of issuing a fresh process for execution, it has not ceased to have jurisdiction to decide an objection lodged before it in respect of anything done in the course of the execution proceedings taken by it.

It seems to us that the case before us stands on a stronger footing. The decree-holder applied invoking inherent jurisdiction of the court to set aside an *ex parte* order to meet the ends of justice. The proper court to entertain such an application was obviously the very court which had passed the order which was sought to be set aside. The inherent jurisdiction vested in that court and not in the Cawnpore court which could not properly consider the propriety of the previous order. If a question arose for a review of judgment or for setting aside an *ex parte* order, that jurisdiction could be properly exercised by the court which passed the previous order. This is not a case of a further execution of the decree, which cannot be ordered after the satisfaction had been recorded and certificate sent to the original court, but a question as to whether a previous proceeding should or should not be re-opened. We think that there can be no doubt that the Allahabad court had not ceased to have jurisdiction to entertain an application for the setting aside of its previous order, in the exercise of its inherent jurisdiction.

The revision is accordingly dismissed with costs.

(1) A.I.R., 1925 All., 179.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King

SHIAM LAL AND OTHERS (APPLICANTS) *v.* COLLECTOR OF AGRA (OPPOSITE PARTY)*

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July, 19

Land Acquisition Act (I of 1894), sections 23, 30—Land formerly agricultural but since included within municipal limits and regarded as potential building site—Land occupied by occupancy tenants—Assessment of value of such land—Apportionment of compensation between landlord and tenants—Manual of Revenue Department, chapter XV, paragraphs 467-474, 485, 491—Agra Tenancy Act (Local Act III of 1926), section 40.

On the question of apportionment, as between the landlord and the occupancy tenants, of the compensation awarded under the Land Acquisition Act in respect of a small plot of land which was at one time purely agricultural land but was now to be regarded as a potential building site, being situated within the municipal limits of a city and adjoining a metalled public road having houses all along it,—

Held, by the Full Bench, that in the absence of definite evidence, the court may presume that the interests of the landlord and of the occupancy tenant, exclusive of specific amounts spent on extraordinary improvements of the land, are in the ratio of 10 to 6; but if there are other considerations or circumstances, that presumption may be rebutted.

Held, also, that the market value of the land acquired, irrespective of any consideration as to how it is held by the various persons interested in it, e.g. whether the tenants occupying it have a right of transfer or not, should be first found out, and then the amount apportioned between the various claimants.

Per SULAIMAN, C. J.—The special provision contained in section 40 of the Agra Tenancy Act can be of no help in fixing the proportion of compensation payable where land is acquired by Government from both the landlord and the tenant.

*First Appeal No. 454 of 1929, from a decree of Ganga Nath, District Judge of Agra, dated the 4th of May, 1929.

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The Board of Revenue have, in their Circulars, issued certain directions to Collectors, fixing maxima both for the amount to be awarded to the zamindar and the amount to be awarded to an occupancy tenant in the case of culturable lands; but the method prescribed is not only a complicated one, but it is also difficult to see on what principles it is based.

Per MUKERJI, J.—There is no valid reason for making a distinction, as regards the method of apportionment, between land fit for building site and land fit only for agricultural purposes. The rules framed by the Board of Revenue for the assessment of the values of the interests of the tenant and the landlord in lands held and used for agricultural purposes are not binding on the civil courts.

Per KING, J.—In ordinary cases, where only the agricultural value of the land has to be considered, the question of apportionment between landlord and occupancy tenant does not arise. In such cases the sums payable as compensation to the landlord and to the tenant respectively are separately assessed by the Collector in accordance with paragraphs 467-74 and 485 of chapter XV of the Manual of the Revenue Department. It is only in exceptional cases, where the land has a special value as a potential building site, that the question of apportionment arises; in such cases the assessment has to be made in a lump sum and both landlord and tenant are entitled to a share, as recognized in paragraph 491 of the Manual.

This appeal, which arose out of a Land Acquisition case, was heard by a Division Bench, who referred to a Full Bench the question of apportionment of the compensation money as between the landlord and the occupancy tenants. The following extracts from the referring order passed by the Division Bench contain particulars about the exact nature of the land which was acquired:

"It appears that the land in question is a part of a bigger plot measuring one bigha and four biswas. Seventeen biswas out of this have now been acquired by Government. That area amounts to 2,342 square yards. The plot is situated within the municipal limits of the city of Agra and adjoins a metalled public road and is quite close to another metalled public road which crosses it. This portion is still called village

Bhugipura, but is in a portion of the town which is well inhabited. The map shows that there are houses all along the road in this part of the town. Rajendra Pal Singh, patwari, who was produced by the respondent has stated that the number of houses as well as the population in this part are increasing day by day. The inspection note recorded by the Collector does not show that he found this plot under cultivation at the time when he saw it, although it does not also show that there was any heap of cow-dung cakes or fuel wood on the spot. The claimant led oral evidence to show that this plot had been let to tenants who were using it for such purposes, and that he was getting about Rs.50 a year as rent. On the other hand, the rent from occupancy tenants after deducting Government revenue for this portion comes to Rs.3-5-3."

"We think that this plot of land in the circumstances quoted above cannot be treated as a pure agricultural land, but must be regarded as building site with considerable potential value."

Dr. *N. P. Asthana* and Mr. *B. N. Sahai*, for the appellants.

Mr. *Muhammad Ismail* (Government Advocate), for the respondent.

SULAIMAN, C. J. :—The question referred to the Full Bench is : "In the absence of any specific evidence as to custom, practice or agreement, what would be the fair ratio of distribution of the compensation awarded for agricultural land as between the landlord on the one hand and occupancy tenants on the other?"

A plot of land belonging to a zamindar and occupied by two tenants was acquired by the Government under the Land Acquisition Act. Separate compensations were awarded by the Collector to the zamindar and the tenants. It has been held that the tenants did not make a proper reference to the District Judge, and accordingly they have not been allowed to get any larger compensation. The zamindar objected, but his objection has been dismissed by the District Judge in appeal. A Bench of this Court has come to the conclusion that the full value of the compensation for the land acquired is Rs.2,500, and has further held that the zamindar is

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entitled to only so much out of it as would represent adequate compensation for the acquisition of his interest in the land and that any excess amount which should have gone to the tenants can be retained by the Secretary of State.

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In assessing the compensation the Bench has, on the strength of an earlier ruling of this Court in *Rohan Lal* v. *Collector of Etah* (1), and one of the Calcutta High Court in *Collector of Jalpaiguri* v. *Jalpaiguri Tea Co.* (2), proceeded on the principle that the market value of the land acquired, irrespective of any consideration as to how it is held by the various persons interested in it, should be first found out, and then the amount apportioned between the various claimants.

Such a view obviously gives much more to the zamindar than he would ever be able to get in an open market as consideration for his interest, when hampered by the rights of occupancy tenants. It also gives to the tenant a share in the enhanced value of the land on account of its becoming a building site, although the occupation by the tenant is for agricultural purposes only and he cannot build upon it. This seems somewhat unfair to Government. On the other hand, when the Government is forcibly acquiring land as a third party, it does not seem to be unfair that it should be called upon to pay the full value of the land which it can fetch if all the rights were to be simultaneously transferred free from all obstacles. The question of distribution among the claimants who can mutually settle their disputes among themselves does not directly concern the Government, nor does it seem just that the Government should take advantage of such a possible dispute. That question, however, has not been referred to us. The only question that arises for consideration is as to the apportionment of the compensation between the zamindar on the one hand and the tenants on the other.

(1) (1929) I.L.R., 51 All., 765. (2) (1931) I.L.R., 58 Cal., 1345.

The Board of Revenue have, in their Circulars, issued certain directions to Collectors fixing maxima both for the amount to be awarded to the zamindar and the amount to be awarded to an occupancy tenant in the case of culturable lands. An occupancy tenant is allowed four times the rent-rate payable by a statutory tenant, plus 10 times the difference between that rate and the rent actually paid by the occupancy tenant; whereas the zamindar is allowed no more than 16 times his net profit. The method is not only a complicated one, but it is also difficult to see on what principles it is based.

In section 40 of the new Tenancy Act provision has been made for the acquisition of land by a landlord from an occupancy tenant, but that is for the special purpose of farming on improved lines, and before acquisition can be made the Collector has to be satisfied that reasonable grounds exist for ordering such an acquisition, and the Collector is bound to award to the tenant another land with similar advantages in the same village or, with his consent, in another village; and it is only to such extent as such land is not available that the Collector has to award monetary compensation. The rate of monetary compensation fixed is six times the annual rental value of the land calculated at rates prescribed for statutory tenants. But as non-occupancy tenants have become statutory tenants under the Act, the rents payable by statutory tenants are likely to approximate to rents payable by non-occupancy tenants. We do not think that this special provision can be of any help in fixing the proportion where land is acquired by Government from both the landlord and the tenant. The loss to the tenant is not represented by a multiple of the rent which he pays to the zamindar, but by a multiple of what he himself derives from the land.

The landlord can never sell his interest, subject to the rights of occupancy of tenants, at the full rate which

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the land would fetch if it were not hampered by occupancy rights. He is therefore not entitled to the entire compensation minus six times the rent. This would be ignoring the fact that without the surrender of the occupancy rights the utility of the land for building purposes is very small indeed, and the tenant is entitled to claim compensation for the surrender of his rights of occupation.

No doubt in Calcutta greater emphasis appears to have been laid in several cases on the fact that the zamindar is the owner of the land. As against this, it cannot be lost sight of that the occupancy tenant is in actual possession of the land and that the zamindar's possession is only constructive.

Prior to 1929, there does not appear to have been any case of this Court in which any hard and fast rule for apportionment was laid down. In the case of *Hirdey Narain* v. *Powell* (1) the High Court did not accept all the conclusions of the District Judge and did not find that the tenant had any transferable right or any absolute right to build upon the land, and yet it divided up the amount of the compensation between the zamindar and the tenant in the ratio of the net incomes derived by each. At page 13 the learned Judges observed: "in the absence of definite evidence as to the respective rights of the parties in the land, we think that the sum awarded should be divided between them in proportion to the values of the interests hitherto enjoyed by them, after making due allowance for the possibility of the rent being enhanced." They accepted the finding of the District Judge that the annual value of the tenant's interest in the land was Rs.22 and the annual value of the appellant's interest was Rs.11 and then they divided the total sum in the proportion of two-thirds and one-third respectively.

(1) (1912) I.L.R., 35 All., 9.

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In the case of *Orde* v. *Secretary of State for India* (1) the occupancy tenants did not come up in appeal before the High Court and the zamindar alone was claiming a larger amount than what had been awarded. It had been found by the District Judge that the market value of the property was at the rate of Rs.500 per bigha. The Collector had awarded to the tenant compensation at the rate of Rs.108 per bigha and to the zamindar at the rate of Rs.213. The District Judge disallowed the claim of the zamindar to get more, on the ground that "as the land in question was hampered by the existence of the tenants' occupancy rights it had no value, other than the value calculated on its rent income, to a person who could not extinguish those occupancy rights". The zamindar claimed the whole of the compensation minus what had been given to the tenant. A Division Bench of this Court (PIGGOTT and WALSH, JJ.) held that had it been established that the occupancy tenants were prepared to surrender their rights to their proprietor for the time being in return for the sum awarded to them by the Collector, there might have been some basis for the contention that the award in favour of the zamindar should be increased by the difference between the market value of the land as a building site and the sum total of the compensation awarded by the Collector to both, but as there was no such evidence on the record, the mere acquiescence by the occupancy tenants in the Collector's award by no means suggested as a necessary inference the fact that they would not have stood out for a higher price if they had found themselves bargaining with a proposed purchaser of the proprietary rights. In the result, they upheld the order of the District Judge under which the zamindar had got compensation at the rate of Rs.213 per bigha, although the value of the land was found to be Rs.500 per bigha. This also worked out at less than half.

(1) (1918) I.L.R., 40 All., 367.

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The latest case of this Court is *Rohan Lal* v. *Collector of Etah* (1). The Division Bench, to which one of us was a party, clearly pointed out that there was a substantial disparity between the rights of a landlord and the rights of an occupancy tenant in these provinces. The following facts were particularly emphasised, at page 769, viz., (1) that an occupancy tenant's rent is liable to enhancement, although within statutory limits; (2) that the tenant is unable to transfer his rights; (3) that his right even to sublet is very much limited; (4) that in the case of rent falling into arrears, from whatever reason, he is liable to be ejected; (5) that in the case of the tenant dying without one of the statutory heirs, the tenancy would lapse to the landlord. It was also added that the number of statutory heirs was small and the chances of the occupancy rights lapsing were not at all remote. The reference to the rights to the minerals may be disregarded. The learned Judges conceded that it was difficult to give a money value to the respective rights of the zamindar and the occupancy tenant; but that a fair estimate of the respective rights of the zamindar and the occupancy tenant was in the ratio of 10 annas and 6 annas in the rupee.

As against the points in favour of the zamindar, there are points in favour of the occupancy tenant as well:

1. (*a*) No doubt, an occupancy tenant's rent is liable to enhancement, but the enhancement of the rent of an occupancy tenant cannot be effected more than once in 20 years, and this, too, for not more than 25 per cent. (sections 67 and 50 of the Tenancy Act).

(*b*) As against this, the Government revenue payable by the zamindar is also liable to enhancement, though it cannot be enhanced within the period of the existing settlement.

2. Of course, the occupancy tenant has no right to transfer his rights, whereas the zamindar can

(1) (1929) I.L.R., 51 All., 765.

transfer his proprietary interest. But the value of the transferable interest of the zamindar is, for all practical purposes, governed by the rent which he receives from the tenant. Although he transfers his other contingent rights, he has no right of actual occupation.

3. The right of a tenant to sublet the land is very much limited, but as against this the zamindar's right to sublet the land to anybody else and put him in possession does not exist so long as the occupancy tenant continues.

4. The tenant is liable to ejectment when the rent falls into arrears. Similarly the zamindar's proprietary interest can be sold if he does not pay the Government revenue.

5. In the case of the tenant's line becoming extinct or there being no other collateral sharing in the cultivation, the tenancy would lapse to the landlord. But such a contingency may be remote; and there is also a possibility of the zamindar dying heirless, in which case the land would escheat to Government.

The outstanding facts are that the landlord's right is limited in practice to the collection of rent whereas the tenant is in actual physical possession of the land, and on the other hand the proprietary interest in the land vests exclusively in the zamindar and not in the tenant. If the zamindar were to sell his land occupied by occupancy tenants in open market he cannot get a higher price than what would be calculated on the basis of the rent realised by him, because the occupation by the occupancy tenant stands in the way of his building upon it. On the other hand, it is also clear that an occupancy tenant has no right to build upon the land without the permission of the zamindar, and such permission would not ordinarily be obtained without the payment of a heavy nazrana. The tenant's right is primarily confined to the occupation of the land for agricultural purposes. He can always get his full subletting value, but not ordinarily its value as a building

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site. But he is also entitled to surrender value of the land, that is to say, the compensation which he can demand from the landlord before he would agree to surrender his occupancy rights. When land is acquired compulsorily, the tenant loses his physical possession whereas the zamindar loses his proprietary interest and constructive possession. It therefore follows that the benefit of the enhanced value of the land should go both to the zamindar and the tenant. The question, in what proportion it should go, is a difficult one.

It seems to be very difficult to say definitely that in every case the bundle of rights possessed by the zamindar would necessarily outweigh the bundle of rights possessed by an occupancy tenant, and even if they do so outweigh, it is still more difficult to value the excess of the rights possessed by the zamindar.

For instance, there may be a tenant who has a large family of sons and grandsons, and there is no prospect of his line becoming extinct, and he may also be fairly well off so that there is no fear of his being ejected for non-payment of rent. In such a case the prospective chance of the zamindar of obtaining the occupancy tenancy is almost negligible. On the other hand, there may be an old Hindu widow as an occupancy tenant, who has no daughter, daughter's son or collateral of her deceased husband joint with her in the cultivation. In such a case the chance of the tenancy lapsing to the zamindar would be very great, and the value of the interest of the zamindar, therefore, fairly high.

The method adopted by GRIFFIN and CHAMIER, JJ., in *Hirdey Narain's* case (1) was that in the absence of definite evidence as to the respective rights of the parties in the land the apportionment should be in the ratio of the annual values of their interests, i.e. in the ratio of the net profits to the zamindar and the net profits to the tenant. The net profits of the zamindar

(1) (1912) I.L.R., 35 All., 9.

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are to be determined by the difference in the amount of rent received and the amount of Government revenue paid by him; and the net profit of the occupancy tenant would be the difference between the rent which he would get by subletting the land and the rent which he pays to the zamindar. This method puts the zamindar and the tenant on the same footing so far as the enhanced value is concerned. But in most cases such a method of distribution of the compensation would result in giving to the zamindar slightly more than what the tenant would get and may approximate to the ratio of 10 annas and 6 annas in the rupee.

There can, therefore, be no great objection to the adoption of the rough rule of practice which was laid down in *Rohan Lal's* case (1) when there are no other considerations and there is no other definite evidence to the contrary. It must, however, be clearly understood that this rough and ready rule is not accepted by me as any rule of law, but merely as a rule of practice for the purpose of forming a rough estimate of the respective rights of the zamindar and the tenants, to be a guide only when both the parties have failed to adduce any definite evidence to show other considerations and circumstances which would lead to a more satisfactory assessment of their respective rights. When the parties have failed to adduce any evidence and the court has to apportion the amount, it cannot but act in a somewhat arbitrary manner in trying to make a fair estimate. I think that in such an event the court is not likely to be far wrong if it were to accept the ratio suggested in the latest case of this Court, *prima facie* as a just proportion. In the absence of definite evidence the court may presume that the interest of the landholder and that of the occupancy tenant are in the ratio of 10 to 6; but if there

(1) (1929) I.L.R., 51 All., 765.

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are other considerations and circumstances, that presumption may be rebutted. Of course, where either the landholder or the tenant proves that a specific amount has been spent on an extraordinary improvement of the land by him exclusively, compensation equal to that amount will have to be fixed separately for such improvement.

This is my answer to the question referred.

MUKERJI, J. :—I agree with the CHIEF JUSTICE and KING, J., that as a rough and ready means of dividing the compensation between the landlord and the occupancy tenant the ratio of 10 to 6 is a fair ratio. I, however, wish to say a few words.

When the Government acquires a piece of land, it must pay the legitimate value of it, irrespective of the fact who holds the land and in what shares. The land may be held by, say, 100 petty sharers and it may again be held by tenants and sub-tenants. The proprietors may find it extremely difficult to agree among themselves as to whether they should sell the land, and therefore it may be well nigh impossible for them to sell the land to a private purchaser. Again, for the reason that some of the actual holders of the land are tenants without any right of transfer and for the reason that the landlord and the tenant can not agree to give a transferee good title and possession, there may be practical difficulty in transferring the property to a private individual. But these considerations can not be relevant in finding out the price which the Government must pay in acquiring the land. If these considerations were relevant, the Government would pay different prices for the same land in different circumstances which have nothing to do with the intrinsic worth of the land or the market value of it.

When the price payable by the Government has been determined, the question of apportionment will arise and then we must find out the proportionate values of

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the interests of the people who have anything to do with the land. This will have to be done, whether the land has any value as a building site or not. I am unable to discover any valid reason for making a distinction between methods of apportionment in these two cases. The argument that there were difficulties in the way of the proprietors or the holders of different interests in the land to give a perfect title and possession to a private purchaser does hold good in both cases and in both cases the difficulty is removed by the fact of compulsory acquisition of all interests in the property. In the case of *Rohan Lal* v. *Collector of Etah* (1) to the decision in which I am a party, no distinction was drawn between a land fit for building site and land fit only for agricultural purposes, and, I respectfully submit, no such distinction exists. I may also mention by the way that in the said case the mention of the right of the landlord to the minerals was made in a general way and not having regard to the rights of landlords in these provinces, where there is only a temporary settlement. In another case, to the decision of which I was also a party, *Khushal Singh* v. *Secretary of State for India* (2), it was held that the Government and not the zamindar in these provinces was the owner of the minerals.

As regards the rules framed by the Board of Revenue for the assessment of the values of the interests of the tenant and the landlord in lands held and used for agricultural purposes, it is enough to say that those rules are not binding on the civil courts, and where they are in conflict with the right view of things they must give way.

I agree to the answer proposed by the CHIEF JUSTICE.

KING, J. :—I agree that the suggested ratio of 10 to 6 may be adopted as a rough and ready rule of practice

(1) (1929) I.L.R., 51 All., 765. (2) (1931) I.L.R., 53 All., 658.

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in the absence of any evidence to the contrary, in exceptional cases, like the present one, where the land has a special value as a potential building site.

In my opinion the ratio suggested has no application to ordinary cases where only the agricultural value of the land has to be considered. In such cases the question of apportionment between landlord and occupancy tenant does not arise. The Collector makes his award in accordance with the instructions contained in chapter XV of the Manual of the Revenue Department. The sums payable as compensation to the landlord and to the tenant respectively are separately assessed. The landlord's compensation is calculated in accordance with paragraphs 467 to 474, and the occupancy tenant's compensation in accordance with paragraph 485. The point that I mean to emphasize is that the compensation payable to the landlord and to the tenant is calculated separately and independently. The result is that there is no lump sum, or joint assessment, which has to be apportioned between the landlord and the tenant. It would no doubt be possible to work out the average ratio of the landlord's interest to the tenant's interest by comparing the sums paid as compensation to landlords and to tenants respectively in a large number of cases. We have no materials for calculating the average ratio and I do not see what useful purpose would be served by such a calculation. In practice the courts are not called upon to divide any lump sum between the landlord and the tenant. If a reference is made to the court by the landlord, or by the tenant, then the court has to decide whether the compensation awarded to the landlord or to the tenant, as the case may be, is fair and adequate, but there is no question of apportionment of a lump sum between landlord and tenant.

It is only in exceptional cases, where the land has a special value as a potential building site, that the question of apportionment arises. I quite agree with the

CHIEF JUSTICE that this special building value should be divided between the landlord and the tenant. The land does not become available to a third party for building purposes unless the landlord transfers his interests and the occupancy tenant also surrenders his occupancy rights. Thus, both landlord and tenant are clearly entitled to a share in the special value. This principle is also expressly recognized in paragraph 491 of the Manual. Where the land has a special building value the assessment has to be made in a lump sum and both landlord and tenant are entitled to a share. So it is only in exceptional cases of this class that the question of apportionment between landlord and tenant arises. I see no reason to dissent from the suggested ratio of 10 to 6, but I would restrict the application of the ratio to cases where the land has a special value, as a building site, in addition to its agricultural value. It should also be understood that the suggested ratio applies only to temporarily settled estates.

BY THE COURT :—In the absence of definite evidence the court may presume that the interests of the landlord and of the occupancy tenant, exclusive of specific amounts spent on extraordinary improvements of the land, are in the ratio of 10 to 6; but if there are other considerations or circumstances, that presumption may be rebutted.

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King.

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Companies Act (VII of 1913), *section* 235—*Misfeasance by managing agents—Liquidator's application for taking misfeasance proceedings and ordering restoration—Limitation*—Terminus a quo—*Whether commencement of liquidation gives a fresh starting point—Limitation Act (IX of* 1908), *articles* 36, 115, 116, 120.

A company went into voluntary liquidation on the 12th of May, 1927, and the chairman of the board of directors was appointed as the liquidator. Later on, the High Court passed an order on the 5th of July, 1929, for a compulsory winding up by the Court, and an official liquidator was appointed. On the 28th of May, 1930, the official liquidator made an application under section 235 of the Companies Act, alleging various acts of misfeasance, misappropriation and negligence of duty against the managing agents of the company, and praying for an investigation into their conduct and for an order directing them to restore or contribute to the assets such sums as they might be found liable for. The question of limitation having arisen in connection with this application,—

Held by the Full Bench (MUKERJI, J., dissenting) that the winding up order does not give a fresh start either to a liquidator, or contributory or creditor for the purposes of limitation and that the relevant article of the Limitation Act, which would be appropriate according to the relief sought, would be applicable to the application under section 235 as if it were a suit brought for seeking the same relief on behalf of the company. *In the matter of Union Bank, Allahabad, Ltd.* (1) *and Official Liquidators, Jaunpur Sugar Factory* v. *Behani and Co.* (2), overruled.

Per SULAIMAN, C. J.—Section 235 of the Companies Act does not create any foundation upon which a claim for payment of money can be based; it creates no new rights. There is no absolute right in the persons named in that section to enforce the liability of the person complained against, or to recover anything for themselves; and the application is filed not for the purpose of enforcing any personal remedy or obtaining any exclusive benefit, but to

*Appeal No. 56 of 1931 under section 10 of the Letters Patent.

(1) (1925) I.L.R., 47 All., 669. (2) Unreported; but *see* pp. 947-60 *infra*.

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draw the attention of the court to the matters complained against, with a view that the court may, in its discretion, start an inquiry and take steps under the section.

The power of the court to take proceedings and act under section 235 is purely discretionary and it may leave the applicant to seek his remedy by a regular suit, and it would readily take that course in case it is apparent that the procedure under that section, if continued, would deprive the opposite party of some defence or answer, e.g. by way of limitation, which would be open to him in a regular suit instituted by the person entitled to sue. Sub-section (3) of the section expressly makes provision for such defence on the ground of limitation.

The property of the company does not vest in the official liquidator; and whatever legal proceeding he takes, he does not take it in any personal right or capacity but must take it in the name and on behalf of the company. Similar considerations apply to the other persons entitled to make an application under section 235, and the application by a creditor or a contributory is obviously a representative application filed on behalf and for the benefit of a class of persons, and there is no right conferred by the section on either to start a fresh proceeding in his own right and for his own personal benefit.

If a new right had been created by section 235, only then there could have been a new start for the purposes of limitation. There is no fresh start for purposes of limitation necessarily beginning from the date of the liquidation proceedings.

What sub-section (3) of section 235 says is that the law of limitation applicable to an application under the section would be the same as if a suit were filed. It does not necessarily mean that such a suit was to be filed by the applicant in his own personal right. The appropriate article of the Limitation Act applicable to a suit of the nature of the relief claimed in the application would continue to be applicable. If a suit could have been brought by the company against the opposite party, then the article of the Limitation Act applicable to such a suit would continue to be applicable even if instead of filing a suit the liquidator files an application under section 235. It can not be laid down broadly that only article 120 would apply and that no other specific article can ever apply.

[*Per* MUKERJI, J.—Section 235 of the Companies Act can not be regarded as being only a provision prescribing a

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procedure,—a procedure in addition to the remedy which is open to the applicant by way of a suit. Though this may be the case with the liquidator, it is not the case with the creditor or the contributory, who also are entitled to apply under the section; a creditor or a contributory could not, independently of that section, bring a suit against the managing agent for alleged mismanagement or misfeasance. It is clear, therefore, that section 235 gives special rights which would not exist otherwise.

The expression that section 235 (or the corresponding section of the English Companies Act) "creates no new rights" has been used only in this sense that the section does not enable any of the applicants mentioned therein to recover anything for which no liability was created or incurred under the general law.

The proposition that where a suit by the company would be barred, an application by the liquidator under section 235 must be held to be barred, is not correct. A subsequent liquidator can proceed under the section against an earlier liquidator for misfeasance, although the company could not have brought a suit for similar relief, for the company ceased to be able to bring any suit by the time when the first liquidator was even appointed. Further, the significance of the words "such application" in sub-section (3) of section 235 should not be overlooked; these words can only mean an application by the creditor or contributory or liquidator. Therefore, the plaintiff of the "suit" mentioned in the sub-section for purposes of computing limitation must be the person who is the applicant under section 235, and not the company. The criterion for purposes of limitation is not a suit which could have been brought by the company, but a suit which could have been brought by the applicant under the section. It might be said that a suit by the liquidator would be a suit in the name and on behalf of the company; but a suit by a creditor or a contributory could not be said to be one on behalf of the company, as neither of them is entitled to bring such suit.

The date from which the limitation for an application under section 235 starts is the date of the winding up order. The only article of the Limitation Act applicable to an application like the one in the present case is article 120. Articles 36, 115 and 116 have no application to the case.]

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Dr. *K. N. Katju* and *Banke Behari*, for the appellant.

Messrs. *P. L. Banerji*, and *Hazari Lal Kapoor*, for the respondent.

SULAIMAN, C. J. :—An important question of limitation arose in this case and that question has been referred to a Full Bench by the Division Bench before which the case came on for hearing at first. The U. P. Oil Mills Company, Ltd., was a registered company which came into existence on 25th June, 1920, and commenced business in December of that year. Paras Ram and Company were appointed managing agents of this company and, as the Articles of Association show, it seems that there was an agreement between the managing agents and the company that the agents would conduct business under the supervision of the directors of the company. After carrying on business for a few years the company went into liquidation on 12th May, 1927, and Chaudhry Liaqat Husain Khan, the Chairman of the Board of Directors, was at first appointed as the liquidator. Later on, on application made to the High Court, there was an order passed on the 5th July, 1929, for a compulsory winding up and an official liquidator, Mr. Hazari Lal Kapoor, was appointed by the High Court. On the 28th May, 1930, the official liquidator filed an application under section 235 of the Indian Companies Act against the managing agents charging them with various acts of misfeasance, misappropriation, negligence of duty and so on. The question of limitation has arisen in connection with this application.

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Admittedly the section which is applicable to this case is section 235 of the Indian Companies Act. This section is a verbatim copy of the provisions of section 276 of the English Act of 1929, with this exception that there is an additional sub-section (3) in the Indian Act.

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So far as the main language of the section is concerned, it was copied out in the corresponding section 214 of Act VI of 1882 from section 165 of the English Act of 1862.

At one stage there was some doubt whether there was any limitation applicable to applications made under the old section 214 of the Indian Companies Act at all. Such doubt was expressed by this Court in the case of *Connell* v. *The Himalaya Bank* (1). There was also some doubt expressed by the Madras High Court in the case of *Ramasami* v. *Streeramulu Chetti* (2). It is possible that with a view to remove all ambiguity sub-section (3) was added by the legislature in Act VII of 1913.

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Although the only section we have to consider is section 235, it would be necessary to compare its provisions with those contained in sections 156 and 186 of the same Act. Perhaps it will be convenient to give first a brief history of the case-law in this country.

In *Bank of Multan, Ltd.* v. *Hukam Chand* (3) the Lahore High Court expressed the opinion that in a case of an application filed against an ex-director under section 235 to recover compensation in respect of an alleged act of misfeasance or breach of trust, the proper article applicable was article 36 of the Indian Limitation Act and that the starting point of limitation was the date of the act complained of.

In *In the matter of Union Bank, Allahabad, Ltd.* (4) a Bench of this Court, of which one of us was a member, had to consider the proper article applicable to an application against the directors of the company under section 235 of the Act to enforce their liability in respect of a previous negligence. WALSH, J., was inclined to the view that section 235 provides "a machinery for enforcing claims which exist independently of the section, but so far as a liqui-

(1) (1895) I.L.R., 18 All., 12.
(2) (1896) I.L.R., 19 Mad., 149.
(3) (1922) 71 Indian Cases, 899.
(4) (1925) I.L.R., 47 All., 669 (686-687).

dator is authorised by this section to apply, in the interest of creditors and depositors who have lost their money, to enforce a claim against the directors under the section, it seems to me that a new right in him is created." The learned Judge then went on to consider which article was applicable and applied article 120. He however observed at page 687 that "whatever article of the statute of limitation is applicable, the time begins to run from the date when the liquidation took place, when the liquidator first had the right vested in him." The other learned Judge, MUKERJI, J., (pages 694-695) did not remark that any new right in any sense was created by the section, but came to the conclusion that neither article 36 nor article 115 or 116 could be applicable but that the proper article was article 120, and that the right to sue under that article "would accrue only after the appointment of the liquidator, if not after he discovers the misapplication of the money." The learned Judges expressly dissented from the view expressed by the Lahore High Court in the case quoted above.

The matter again arose in the case of *Bhim Singh* v. *Official Liquidator, Union Bank of India* (1), which was also a case of an application under section 235 of the Indian Companies Act in respect of an act of misfeasance complained of against a director. The learned Judges of the Lahore High Court adhered to the opinion previously expressed and held that the section merely provided a summary remedy of enforcing the existing rights which, apart from the section, might have been vindicated by means of a suit and that the article applicable was article 36 of the Limitation Act, with the starting point from the date of the act of misfeasance.

The question also arose before the Madras High Court in the case of *Narasimha Ayyangar* v. *Official Assignee of Madras* (2), which was a case of an

(1) (1926) I.L.R., 8 Lah., 167. (2) (1930) I.L.R., 54 Mad., 153.

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application under section 235 made against the directors of the company by a liquidator seeking to recover money by way of compensation for their acts of misfeasance. It was held that "limitation begins to run from the date of the commission of the alleged acts of misfeasance and not from the date of the order directing the winding up of the company."

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When the same question arose for consideration before the Bombay High Court in the case of *Govind Narayan Kakade* v. *Rangnath Gopal* (1) the learned CHIEF JUSTICE and his learned colleague agreed with the Lahore High Court in so far as they held that section 235 did not create any new right and that there was not a fresh start for the purposes of limitation as a result of the liquidation proceedings. But they agreed with the view expressed by the Allahabad High Court that neither article 36 nor article 115 or 116 could be applied and that the proper article applicable was article 120 only.

In another unreported case, namely, that of *Official Liquidators, Jaunpur Sugar Factory* v. *Behari and Co.* (2), one of us and Mr. Justice YOUNG had to consider the same question again. All the English authorities as well as the Lahore High Court cases were cited before them. After a survey of the case law and an exhaustive examination and careful consideration of the provisions of the different sections the learned Judges came to the conclusion that the view previously expressed in the decisions of this Court was correct. Their conclusion was that an official liquidator is an officer of the court and not a representative of either the body of creditors or of the whole body of contributories or of the company itself; it is only by virtue of his being an officer of the court that he is allowed to take into his custody the property and the assets of the company. He not being a representative of the company, it did not necessarily follow that if a suit brought by a company against a

(1) (1929) I.L.R., 54 Bom., 226. (2) *See* pp. 947-60 *infra*.

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director or other persons liable would be time barred, that a suit by an official liquidator or a creditor or a contributory would be equally barred. The learned Judges pointed out that the rule of limitation is a mere rule of procedure and that the right to recover a debt is not extinguished by lapse of time but only the remedy to recover it is barred and that accordingly the legislature might well have thought fit to enact that where there would be a bar to a company to recover a just claim, it would not be a bar to a liquidator or a contributory. Their conclusion was that section 235 enables any of the three classes of persons mentioned therein to recover what could not be recovered under the general law. Examining the words of the section the learned Judges came to the conclusion that the right which the section gives is not given to the company but to the persons named in the section. They pointed out that under the Act the legislature has made provisions, for instance in section 156, for making the ordinary law of limitation inapplicable by creating a fresh liability, and they also relied on the circumstance that according to the rulings of this Court it had been held that there was a fresh start for the purposes of limitation in the case of an application under section 186 of the Act.

Dealing with the question of the applicability of the particular article of the Limitation Act it was pointed out that article 36 would be inapplicable because it could only apply when the misfeasance would be independent of a contract; whereas in the case of directors, who are governed by the articles of association, it cannot be said that their misfeasance would be independent of their contractual liability. It was pointed out that articles 115 or 116 would be inapplicable from the very nature of the case because the remedy is being sought not on account of any breach of a particular contract, as those articles contemplate, but on account of a breach of a general duty. Further as article 120 prescribes a period of

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limitation starting from the date when the right to sue accrues and the right to sue can accrue only when three things are in existence, namely (1) the act which gives rise to a suit, (2) the presence of the plaintiff and (3) the presence of the defendant, and all these matters can only come together when the official liquidator is brought into existence, therefore article 120 applies but the starting point of limitation must be the date of the liquidation.

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A similar question arose, not under section 235 but under section 186 of the Companies Act, in an unreported case of this Court which ultimately went up before their Lordships of the Privy Council. Their Lordships' judgment is reported in the case of *Hansraj Gupta* v. *Official Liquidators of Dehra Dun etc. Company* (1). The Bench of this Court, following the pronouncements in the earlier decisions while dealing with an application under section 235 of the Act, had come to the conclusion that the application made was not barred by time inasmuch as limitation had not begun to run till the liquidation proceedings started. Their Lordships did not agree with this view and dismissed the application.

No doubt the decision was under section 186 of the Companies Act and not under section 235 which we have to consider. But certain principles laid down by their Lordships appear to me to be of equal application. In the first place, their Lordships referred to the English law and pointed out that the Indian section which had been borrowed verbatim from the English section had an ancestral history. In *Hansraj Gupta's* case their Lordships remarked at page 1078: "Three features of the section call for notice: (1) It is concerned only with moneys due from a *contributory*, other than money payable by virtue of a call in pursuance of the Act. A debtor who is not a contributory is untouched by it. Moneys due from him are recoverable

(1) (1932) I.L.R., 54 All., 1067.

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only by suit in the company's name. (2) It is a section which creates a special procedure for obtaining payment of moneys; it is not a section which purports to create a foundation upon which to base a claim for payment. It creates no new rights. (3) The power of the court to order payment is discretionary. It may refuse to act under the section, leaving the liquidator to sue in the name of the company, and it will readily take that course in any case in which it is made apparent that the respondent under this procedure, if continued, would be deprived of some defence or answer open to him in a suit for the same moneys."

The implications of these observations would be considered when I come to consider the provisions of section 235. It may be pointed out at this stage that their Lordships went on to observe that the old section 101 of the English Act of 1862, corresponding to section 186 of the Indian Act, had been judicially interpreted and administered in accordance with the views expressed in *Stringer's case* (1), namely that the section is one which provides summary proceedings against contributories to avoid proceedings in different courts and to permit a single proceeding in the winding up court—but "in those summary proceedings every objection is just as open to the person sought to be charged as it would have been if a bill had been filed."

Their Lordships thought that the position in this respect in India is the same as in England.

It may, in this connection, be noted that *Stringer's case* (1) arose out of an application filed against the directors of the company for misfeasance on account of certain improper payments of dividends which had been made by the managing director out of the capital of the company. The case fell both under section 101 and under section 165 of the English Act, corresponding to sections 186 and 235 of the Indian Act. In the

(1) (1869) L.R., 4 Ch. App., 475.

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course of his observations SELWYN, L. J., at page 483 referred to *Carpenter and Weiss's case* (1) in which PARKER, V.-C., in a case where the directors had employed moneys belonging to the company in purchasing the shares of the company itself and had been proceeded against in a summary way, had allowed the application. SELWYN, L. J., at page 484 remarked: "That case appears to me to be of importance in two respects, first, as showing the clear opinion of so eminent a Judge as Sir JAMES PARKER, that in such a case the Master had jurisdiction without any bill being filed; and, secondly, that in those summary proceedings every objection is just as open to the person sought to be charged as it would have been if a bill had been filed."

It is this observation which has been quoted by their Lordships of the Privy Council in *Hansraj Gupta's case* (2). The observation was made in a case to which section 165 of the English Act applied, and their Lordships adopted the same principles in a case under section 186 of the Indian Act which arose before their Lordships. This alone is sufficient to indicate that the principles intended to be laid down by their Lordships of the Privy Council are not so narrow as to be limited to the provisions of section 186 only.

It is not necessary to examine the cases of the English Courts, as we are not really concerned with the opinion which has prevailed in England; but it may be convenient to point out that in the latest English case which has been brought to our notice, namely, *In re City Equitable Fire Insurance Company, Ltd.* (3), the view has been expressed by all the learned Judges that the English section lays down and prescribes a special procedure and does not create any new right. POLLOCK, M. R., with reference to section 215, which corresponds to section 235 of the Indian Act, remarked:

(1) (1852) 5 De G. & Sm., 402.

(2) (1932) I.L.R., 54 All., 1067 (1078-79).

(3) [1925] 1 Ch., 407.

"I desire to say, though this is not the first time that it has been said, that that section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights." The learned Judge then pointed out that this was abundantly clear from a string of authorities in the English Courts. He also quoted the words of MACNAGHTEN, L. J., in the case of *Cavendish Bentinck* v. *Thomas Fenn* (1) that "that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity." He did not at all quote the remarks of HERSCHELL, L. J., in the same case which were somewhat differently worded. WARRINGTON, L. J., at page 526 observed: "I need not read it (section 215) again, it has been read very often, and it has already been accepted as stating, and accurately stating, what was the settled law with regard to the construction of the section corresponding to section 215 of the present Act," and he also quoted an extract from the speech of MACNAGHTEN, L. J., in *Cavendish Bentinck's* case. SARGANT, L. J., at page 527 also referred to *Cavendish Bentinck* v. *Thomas Fenn* and remarked that it "conclusively established that section 215 of the Companies Act . . . . is a procedure section only, and merely provides a summary remedy for enforcing in the liquidation of a company such liabilities as might have been enforced by the company itself, or by its liquidator, by means of an ordinary action."

I take it that this is the view which prevails in England on the section corresponding to section 235 of the Indian Act. As the languages of the two sections are almost identical, I would hesitate very much to depart from the view expressed by such eminent learned Judges in England who have had great experience of

(1) (1887) 12 App. Cas., 652 (669)

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Company law, unless there was something internal in the section itself which would justify its interpretation in a different way.

If section 235 is a procedure section only, then the remark of their Lordships of the Privy Council that it is not a section which purports to create a foundation upon which to base a claim for payment would be equally applicable; similarly the power of the court to make the order for payment is discretionary and it is in its option to refuse to act under the section, leaving the party to sue in the name of the company separately, and it may be ready to take such a course if it is convinced that the procedure under the section would be to deprive the opposite party of some defence or answer open to him in a regular suit. Comparing the language of the three sections, namely 156, 186 and 235, one thing is remarkable. Not only the marginal note to section 156 shows that the section deals with the liability of contributories, but the language of that section imposes a statutory liability under the Act on contributories and lays down that every present and past member shall be liable to contribute to the assets of the company in a certain contingency. As against this section, sections 186 and 235, which have the marginal notes "power to order payment" and "power to assess damages", deal with the power of the court to make the order, the difference being that although in section 186 there is no restriction that the order can be made only on the application made by a particular class of persons, section 235 contains such a restriction. But both these sections empower the court to make an order against the person complained against and neither of them professes to confer a new right on the person applying. Section 235 merely says: "The court may, on the application of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator or officer and compel him to repay or restore the money, etc." It

really gives a discretion to the court to make the order; but the significance of the expression "on the application of the liquidator" is to restrict the power of the court so as to prevent it from proceeding *suo motu* without any application before it. Before the court should start an investigation, there should be some person before it who would be ultimately responsible for the costs in case the application does not succeed; whereas in a proceeding under section 186 the contributories are already on the register and it is known how much they have paid and how much they have not paid and an elaborate investigation of the kind required under section 235 is therefore not called for.

Merely because the section says "on the application of the liquidator" I do not construe it to mean that it creates a new right in the liquidator, creditor or contributory. Even if one were to say that such a right is created, the right would be confined to applying to the court and not to get the relief asked for. Indeed, the application can be made only in the interest of all persons concerned, namely the entire body of creditors and contributories and must be made in the interest and for the benefit of the entire company and persons interested in it. When the liquidator applies he cannot be applying in his own right and for his own interest. When a creditor or contributory applies, he cannot hope to get an order in his own favour personally, or necessarily to get a share in the amount if realised. The object of the application is to make the person liable to refund, restore or pay the amount due from him, which would go into the common funds and would be available for distribution among the persons entitled, and it may well turn out that the person applying does not get any share out of the amount so realised.

The restriction that the court should proceed only on an application of the persons named, in my opinion, implies that the court should not move in the matter

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of itself. The application is merely for the purpose of inviting the attention of the court to the alleged wrongful act and to show that there is a *prima facie* case for inquiry. There is no absolute right in the persons named therein to enforce the liability of the person complained against or to recover anything for themselves. The matter is purely discretionary. If the court has a discretion to examine into the conduct of the person complained against or not, it would follow that there cannot be any right created by the section in favour of the applicant to get the relief sought for. The application is in the nature of bringing the matter to the notice of the court and drawing its attention to the irregularities or misconduct.

If sub-section (1) had stood by itself and we had not sub-section (3) added to this section, the result would have been similar to what was pointed out by their Lordships of the Privy Council in *Hansraj Gupta's* case (1) which was under section 186 of the Act. The only matter before the court being a proceeding arising out of an application, the articles of the Limitation Act which are applicable to suits would have been wholly inapplicable and could not have created any bar. Similarly, in view of the course of decisions in India the applicability of article 181 would have been equally doubtful. It has been held that in view of the fact that all the preceding articles apply to applications made under the Code of Civil Procedure, article 181 also applies to other applications under the same Code, i.e. the application contemplated therein is *ejusdem generis* with the other applications which are specially specified. In this view of the matter even article 181 would not have applied, and, of course, none of the other special articles would have been applicable. The result would have been that there would perhaps be no limitation at all. Then the observation of their Lordships that the well established practice that the court should not

(1) (1932) I.L.R., 54 All., 1067.

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exercise its discretion but readily take the course of leaving the applicant to seek his remedy independently, so as not to deprive the opposite party of some defence or answer open to him in a suit, would have applied with full force.

The legislature has, however, expressly added sub-section (3) which makes the Limitation Act applicable to an application under the section as if such application were a suit. The object obviously is to preserve the right of defence under the Limitation Act and also to make it clear that the articles of the Limitation Act which apply to applications are irrelevant. It seems to me that the addition of the sub-section emphasises the view that there is no fresh start for purposes of limitation, but that the Limitation Act continues to be applicable, the only difference being that the proceeding must be deemed to have been started as if a suit were filed and not as if a mere application had been presented.

No doubt the words "money due" occurring in section 186 do not find place in section 235. But the effect of the addition of sub-section (3) is to preserve the rules of limitation, and more than counterbalances the omission.

It has been contended on behalf of the liquidator by his learned counsel that this section gives a right to the liquidator to apply, and inasmuch as the application is to be treated as a suit the liquidator must of necessity be considered to be the plaintiff suing in his own right and not on behalf of the company, and that, therefore, the appropriate article of the Limitation Act which would be applicable would be one which would apply to the liquidator suing in his own personal right. But this contention cannot be accepted.

The learned counsel for the liquidator has urged that sub-section (3) must mean 'as if such application were a suit filed by the applicant in his own right.' Those

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words are not in the section, and it is not appropriate to interpolate them. The sub-section does not mean that the application must be in the form of a plaint or that it should be registered as a plaint. All that it says is that when an ordinary application contemplated by that sub-section is filed, the law of limitation applicable to it would be the same as if a suit were filed. It does not necessarily mean that such a suit should be filed by the applicant in his own personal right.

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I think section 235 must be read consistently with the other provisions in the same Act. Under section 179 an official liquidator is empowered, with the sanction of the court, to institute or defend any suit or prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company. It is also obvious that as no property vests in the official liquidator, he has no personal right to move in the matter. His power to sue in the name and on behalf of the company is conferred upon him by section 179 of the Act. It, therefore, follows that whatever suit he files or whatever legal proceedings, civil or criminal, he takes, he must take it in the name and on behalf of the company. No doubt the liquidator is an officer of the court, having been appointed by the court, and he is under the direction and control of the court. But when a proceeding is started by him, that proceeding is not initiated in his personal capacity but in the name and on behalf of the company, and it must be deemed as if the proceeding is being continued not only in the interest of the company but actually by the company through its liquidator.

The fact that the present liquidator can file an application against a past liquidator also shows that the application must be deemed to be in the interest of and on behalf of the company and not in his personal right or capacity. There is no right in a liquidator as against a previous liquidator who has retired. No

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doubt under section 235 persons other than the liquidator, namely a creditor or a contributory, also can apply. But, in my opinion, similar considerations apply to these applicants as well. There is no right conferred upon them to start a fresh proceeding in their own right and to get any relief for themselves. They merely move the machinery of the court by filing an application. The purport of the application is to make persons liable to repay money or restore property to the company, so that it may go into the common fund. It is obviously a representative application filed on behalf of a class of persons. If a creditor files it, it is certainly for the benefit and interest of all the creditors; and similarly if a contributory files it, it is obviously in the interest and for the benefit of the entire body of contributories. None of them seeks to enforce any personal remedy or obtain any exclusive benefit.

It has been argued that as there is no independent right in a creditor, or for the matter of that even in a shareholder, to institute a regular suit independently of his right to apply under section 235, the section must create a new right and confer it upon these persons. But the same argument could be advanced in respect of the provisions of the corresponding section in the English Act. No case has been yet brought to our notice which has expressly laid down that even in exceptional circumstances a shareholder cannot maintain a regular suit. Indeed, it is possible to conceive of cases where there is collusion among directors, and a shareholder may bring a suit against a person responsible against whom the directors are not proceeding. It is more difficult to conceive of cases filed by a creditor. But in the view which I take of this section, I am of opinion that no new right is created in either of these three classes of persons, and the application filed by any of them is filed to the court for the purpose of drawing its attention to the matter complained against

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and starting an inquiry in the course of the winding up proceedings. The person against whom a proceeding is started is entitled to set up a defence of limitation and would be protected if he can satisfy the court that if a regular suit had been instituted against him by the person entitled to sue he would have had a good defence of limitation. He is fully protected in such a case. There would no longer be any option for the court to make or refuse to make an order against him. The application must be dismissed. The object of the sub-section is apparently to preserve the right of the person against whom an application is made, which would be open to him in a regular suit under the Indian Limitation Act.

The learned counsel for the liquidator then argued that even if in one sense no new right be held to have been created by section 235, nevertheless the section necessarily gives a fresh start to the liquidator, creditor and contributory, because they have a right to file an application under this section and that right cannot be exercised till the liquidation proceedings have started. It seems to me that only when a new right is really created by this section, that there can be a new start for the purposes of limitation. But if no new right has been created at all, and only a summary procedure has been prescribed and a new forum has been created to which recourse may be had, then there is not necessarily a new start for purposes of limitation. If one were to concede that a new right is created, resulting in a new start for purposes of limitation, the result would be that every applicant may have a fresh and a different starting point. For instance, there may be thousands of contributories in a company and if under the articles of association the relation of principal and agent is created between all the shareholders on one side and the managing agents or directors on the other, the agency would continue and only terminate with the liquidation

proceedings. A suit brought by a shareholder against a director or a managing agent may not in such a case be one filed under article 90 of the Limitation Act in which case the time would begin to run from the date when the neglect or misconduct complained against became known to the plaintiff. If out of thousands of contributories some come to know of it on one day and others come to know of it on other days, the starting point of limitation will vary according to the personality of the contributory who applies to the court. It seems to me that such a view will lead to an impossible result. No doubt in certain special articles of the Limitation Act the status of the plaintiff as distinct from his personality is an important factor. But ordinarily the rules of limitation are for the protection of the defendant and they vary according to the nature of the suit that is instituted and the relief sought against the defendant.

Then again, if every contributory has a new right created in his favour under this Act there would be no bar to successive applications being filed times out of number against the same director by various contributories. No doubt the court has a discretion to refuse such an application, but each contributory may come forward with the allegation that some evidence which might have been forthcoming was not produced on the previous occasion, and the court may have to yield and start a fresh inquiry resulting in an unnecessary harassment of the person complained against. Nor would it be unlikely that when one liquidator has died, retired or resigned and another liquidator is appointed, he may start a fresh proceeding, although the previous liquidator had failed. It seems to me that the application contemplated in section 235 is one filed really on behalf of the company and not in the exercise of any new right conferred upon the applicant. The responsibility for the payment of costs in case of failure would, of course, lie on the person who moved the court in the

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first instance. But the mere fact that the section requires that the court can proceed only on application so made does not necessarily imply that the application made is made in the exercise of the personal right of the applicant. This section allows proceedings to be taken not only against a director, past or present, or manager, but also against officers of the company. If the view advocated for by the learned counsel for the liquidator were accepted, a transaction which is many many years old may be reopened and people who have ceased to have any connection with the company may be brought in again and asked to explain their conduct and justify it after the lapse of a large number of years. No doubt in special cases the court has discretion to refuse to inquire into a stale claim. But if a court is determined to brush aside all considerations of limitation, there would be nothing to prevent it from calling upon such persons to vindicate their conduct in respect of matters which took place long long ago. Had the intention of the legislature been to give a power to the court, if it so decides, to reopen old questions, there would have been no necessity to add sub-section (3) in the section. It would have been quite sufficient to say that the court may, when it considers fit, investigate into the conduct of the persons complained against.

It may be pointed out that if a new right were created in favour of a liquidator and if it were a personal right and the application made by the liquidator were in his own right and not on behalf of the company, then it would follow logically that a new liquidator recently appointed would have a fresh start for purposes of limitation and that successive liquidators would have successive starts, and if the court were determined to reopen an old question, it could ignore all rules of limitation and give a fresh start in favour of the company by appointing a new liquidator. I do not imagine that such a result could ever have been contemplated by

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the legislature. There is nothing in the section which compels me to depart from the view which has been taken of the corresponding section in the English cases and nothing which compels me to hold that in essence section 235 is different from section 186 and that, although there can be no fresh start for purposes of limitation for an application under section 186, there is such a fresh start in the case of an application under section 235.

The position then being that the law of limitation remains unaffected by the starting of liquidation proceedings, it follows that once limitation has begun to run against a person it would not cease to run merely because a liquidation order has been passed. The article of the Limitation Act which would have been applicable to a suit before the liquidation proceedings started would continue to be applicable and the defendant would be entitled to set up a plea of limitation based on that article.

Some stress was laid by WALSH, J., on the impracticability of this view, as in his opinion such a view would render section 235 almost a nullity. But there seems to be really no practical difficulties. If there is a cause of action against any one other than the board of directors, it is the duty of the latter to bring a suit within the prescribed time from the date of such cause of action. If such a director omits to sue, then the shareholders or creditors cannot claim to have an extended period of limitation, unless the appropriate article entitles them to count from the date of knowledge or unless fraud concealing the knowledge extends the period. The same remarks apply to acts committed by past managing agents. In the case of the present managing agents it may well be said that their agency does not terminate till the liquidation proceedings are started. It is the duty of the liquidator as well as the shareholders and creditors to act promptly and discover acts of misconduct and seek relief forthwith. If they

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allow the opportunity to pass away, they have themselves to thank for it. Similarly, in the case of past directors it is the duty of the present directors to proceed, inasmuch as they represent the company. In the case of the present directors, even if they be not considered to be trustees, they may well be agents of the shareholders and time may not begin to run against them till this agency terminates or knowledge is brought home to liquidators and shareholders. I do not see that there is any particular hardship or impracticability in holding that the law of limitation has been left altogether unaltered by the provisions of section 235.

The question what should be the starting point for purposes of limitation would, of course, depend on the particular article which applies to the facts of that case. It cannot be laid down broadly that no other special article can ever apply and only article 120 would apply.

Creditors and contributories existed before the company came into liquidation. The liquidator is, of course, a person who comes into existence after the liquidation. If a suit could have been brought by the company against the opposite party, then the article of limitation, in my opinion, applicable to such a suit would continue to be applicable even if instead of filing a suit the liquidator files an application under section 235. If a different kind of suit could have been brought by a creditor or contributory—without in any way saying that it can be brought, then the particular article applicable would continue, in my opinion, to be applicable to the claim. No change is brought about in consequence of the winding up proceedings. It would follow that if the suit brought in a regular court was of such a nature as to make article 36 or article 90 or even article 115 or 116 applicable, then in the face of these special articles the residuary article 120 would not apply. But if in such a suit no special article is applicable, then one will have to fall back on article 120. Of course, the starting points of limitation under these articles would

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be different. In the case of article 36 time begins to run when the malfeasance, misfeasance or nonfeasance takes place. Under article 90 time begins to run when the neglect or misconduct becomes known to the plaintiff; under articles 115 and 116, when the contract is broken or the breach in respect of which the suit is instituted occurs. Under article 120 limitation begins to run from the date when the right to sue accrues. In the view that I have taken of section 235—that there is no new right created in favour of the applicant—, the right to sue does not accrue only when the liquidation proceedings start, but the right to sue would accrue when it would have accrued if a regular suit were instituted by the person entitled to institute such suit before the liquidation proceedings began. It is, therefore, obvious that it does not necessarily follow that the right to sue cannot accrue under article 120 earlier than the date of the liquidation proceedings.

In this connection I must point out that the learned counsel for the liquidator has laid great stress on the observation of their Lordships of the Privy Council in *Hansraj Gupta's* case (1) at page 1076 that even if article 181 does apply to the application under section 186, the period of limitation prescribed by that article is three years from the time when the right to apply accrued, which time would be not earlier than the date of the winding up order. That observation is obviously intended to mean that if there were a new right to apply under section 186, that right, of course, would not have accrued earlier than the date when the person applying could have made the application. It may also be pointed out that out of the articles in the Limitation Act applicable to applications there is none which can apply to an application under section 186 except article 181; whereas there are numerous articles prescribed for suits which may apply to a suit against directors, contributories, managers, etc., contemplated by section 235, which are other than article 120.

(1) (1932) I.L.R., 54 All., 1067.

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It, therefore, seems to me that although the recent case decided by their Lordships of the Privy Council was a case under section 186 of the Act, the principles laid down therein are of equal application to section 235, and, therefore, in one sense it may be said that by implication the cases of this Court have been overruled. But even assuming that those cases have not by implication been overruled, it seems to me that the principles laid down therein compel me to put a similar interpretation on section 235 as was put by their Lordships of the Privy Council on section 186. I must hold that this section does not create any foundation upon which a claim for payment of money can be based and that it creates no new rights and that the power of the court is discretionary and it may leave the applicant to seek his remedy by a regular suit, and it would readily take that course in case it is apparent that the procedure under that section if continued would deprive the opposite party of some defence or answer open to him in a regular suit. I must accordingly hold that there is no fresh start for purposes of limitation necessarily beginning from the date of the liquidation proceedings, but that the appropriate article applicable to a suit of the nature of the relief claimed in the application would continue to be applicable.

I, therefore, think that in view of the light thrown on the proper interpretation to be put on the sections of the Companies Act by their Lordships of the Privy Council in the recent case, the view of this Court, so far as it laid down that there is a fresh start of limitation, is no longer good law. But the view of this Court in the cases cited above, for the reasons mentioned therein, that articles 36, 115 and 116 were not applicable to the cases before the learned Judges was perfectly sound, and in those cases no other article but article 120 was applicable. I, of course, do not mean to imply

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that there cannot be other cases to which special articles may apply. I am glad to find that this view is in accord with the opinion expressed by the Bombay High Court in *Govind Narayan Kakade* v. *Rangnath Gopal* (1). They have agreed with the Lahore High Court so far as not to give the applicants a fresh starting point, but have agreed with this Court as regards the applicability of article 120 in the cases of the type before them.

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The above is my answer to the question of limitation referred to us.

MUKERJI, J. :—I have the misfortune to differ from my learned colleagues.

This is a reference to a Full Bench, and it has arisen out of an appeal filed by the opposite party in a misfeasance application initiated against him by the official liquidator of the U. P. Oil Mills Company, Ltd., in liquidation. The learned Company Judge has allowed the application in part and an appeal has been filed by Mr. Shiam Lal Diwan.

The point before the Full Bench is one of limitation. The plea of limitation was not urged in the court below and was not urged as one of the grounds of appeal in this Court. But in view of a certain recent decision of their Lordships of the Privy Council to be noticed later on, a plea of limitation was taken, and the learned counsel for the appellant has been heard on that plea.

In two cases decided in this Court it was held that the misfeasance application under section 235 is governed by article 120 of the Limitation Act and the starting point of limitation is the appointment of the official liquidator. To both these decisions I happened to be a party. The earlier decision is *In the matter of Union Bank, Allahabad, Ltd.* (2) and the later decision is unreported and will be found in the case of *Official*

(1) (1929) I.L.R., 54 Bom., 226. (2) (1925) I.L.R., 47 All., 669.

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Liquidators, Jaunpur Sugar Factory v. *Behari and Co.* (1).

I have heard the learned counsel for the appellant at length and had the benefit of discussion on his part of the recent Privy Council judgment in *Hansraj Gupta* v. *Official Liquidators of Dehra Dun etc. Company* (2). Having regard to certain remarks to be noticed later on, contained in the judgment of the Privy Council, I shall have to modify my opinion to this extent that the starting point of limitation would be not the appointment of the liquidator but the date of the winding up order. I will give my reasons later on. Otherwise, I am afraid, I must fully adhere to the opinion I expressed in those two cases.

As in the latter case, which is unreported, I had had the advantage of hearing a very eminent counsel, who is now occupying a seat on the Bench of this Court, and as I wrote a longish judgment dealing with all the English cases and Indian cases cited before me, I do not propose to go over the same grounds again. What I propose to do is to append as a part of my this judgment an extract from the aforesaid judgment, as it is not reported. I will only consider the Privy Council case and such fresh and new arguments as have been adduced before us.

I will start with the Privy Council decision. In the case, which may shortly be described as *Hansraj Gupta's* case, the official liquidator for the company in liquidation claimed certain sums of money, which were undoubtedly, on the findings of the Privy Council itself, due to the company from a contributory, by an application to the Company Judge under section 186 of the Indian Companies Act. The application was heard by two Judges including myself and it was allowed partially. The contributory against whom the application had

(1) *See* pp. 947-60 *infra*.

(2) (1932) I.L.R., 54 All., 1067.

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been made for moneys due to the company appealed to their Lordships of the Privy Council and their Lordships came to the conclusion that the interpretation put by the Judges of this Court on section 186 was not right. Their Lordships of the Privy Council laid down on a construction of the words "money due from him (contributory) to the company" that the words meant that the money was due to the company and could have been recovered by the company by an ordinary suit instituted in a court of ordinary jurisdiction. Their Lordships relied on the interpretation put in England on the corresponding English statute, and especially on what is known as *Stringer's case* (1). I am of opinion that this decision of the Privy Council does not in any way bear on the question which we have to decide.

In *Stringer's case* the main point for decision was whether an application for recovery of money could lie and whether, in a summary way, an order could be passed for recovery of the money. The learned Judge who heard the application in the first instance was of opinion that the remedy of the liquidator lay by a suit and not by an application. In appeal the question was whether an application was a proper remedy, and, in deciding that it was, the following remarks were made: "In those summary proceedings every objection is just as open to the person sought to be charged as it would have been if a bill had been filed."

Their Lordships pointed out that if a suit had been filed on behalf of and in the name of the company by the official liquidators against Hansraj Gupta, Hansraj Gupta would have had a defence by way of limitation, and, therefore, the Judges of the High Court were not right in holding that there was no question of limitation after the winding up order had been made, provided that the claim was not barred at the date of the winding up order. Beyond this, the decision of their Lordships' judgment does not go. It is true that in dealing with

(1) (1869) L.R., 4 Ch. App., 475.

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the section corresponding to section 186 of the Indian Companies Act, their Lordships said that three things were certain, on the decisions given in England, one being that the section created only a special procedure, and it was not a section which purported to create a foundation upon which to base a claim for payment. In other words, it created no new rights. It is argued that similarly section 235 did not create any new rights.

On the question how far any new rights were created by section 235 of the Indian Companies Act and what is the decision of the English courts on the question of new rights given on the English section, I will not add a single word, because I have dealt with the point at length in the judgment, an extract from which will be appended as a part of this judgment. I have tried to show that the words "created no new rights" were used in connection with the particular facts of the cases, and the English cases never considered the language of the section which corresponds to section 235 of the Indian Companies Act, in order to decide a question of limitation.

All that the case of *Hansraj Gupta* (1) lays down is that where a defence is open to the defendant, the person against whom the liquidator is proceeding, if a suit had been instituted against him by the company, those defences should be still open to him in an application to the court to recover money due to the company, by the official liquidator. A somewhat similar rule has been provided for by the legislature in section 235 of the Indian Act. By sub-section (3) the Indian Act lays down: "The Indian Limitation Act, 1908, shall apply to an application under this section as if such application were a suit." Although there was no such provision under section 186 of the Indian Act, their Lordships by their decision laid down that the rule of limitation would still apply. Supposing, therefore, that the decision of their Lordships of the Privy Council

(1) (1932) I.L.R., 54 All., 1067.

applies, all that can be said is that in the application out of which this appeal has arisen the appellant Shiam Lal should not be deprived of his right to plead limitation. This is conceded on all hands. The only question is, what would be the rule of limitation applicable? If this view be correct, the decision of their Lordships of the Privy Council does not make the point at all clear, for the simple reason that their Lordships were not dealing with the question of limitation applicable to section 235, Indian Companies Act.

If I have understood the learned counsel for the appellant clearly, he wants that we should read the following words at the end of sub-section (3), section 235, namely "and it was a suit in the name and on behalf of the company." Thus the entire sub-section, according to the argument of the learned counsel for the appellant, should be read as follows: "The Indian Limitation Act, 1908, shall apply to an application under this section as if such application were a suit and a suit in the name and on behalf of the company." I will notice his arguments in detail and try to find out whether there can be any justification for such an addition. Ordinarily, I may point out, it is against all canons of interpretation to read additional words in an enactment of the legislature.

The argument of the learned counsel for the appellant is this. Section 235 is only a provision prescribing a procedure and is a procedure in addition to the remedy which is open to the applicant by way of suit. He argued that it was open to the liquidator to bring a suit and his remedy was not confined to an application under section 235. This may be the case with the liquidator, but what about the "creditor" and the "contributory"? Could a creditor, independently of section 235, bring a suit in a court of ordinary jurisdiction against the present appellant, Shiam Lal, who is alleged to have been one of the partners of the firm of managing agents who, it is said, mismanaged the company and caused a loss

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to it? Could, again, a single contributory bring a suit for the same relief? No authority has been produced before us to show that such suits could be maintained on behalf of a creditor or a contributory. It is clear, therefore, that section 235 gives special rights to a creditor and to a contributory, which would not exist but for this provision.

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Again, we have to read the provisions of a law in order to find out what the law means. Section 235 begins with these words: "Where, in the course of winding up a company, it appears". What has to appear is to appear in the course of winding up. A matter may have "appeared" to a man, who is a contributory in liquidation, before the winding up started, but he could not have made an application before the Company Judge and he could not have filed a suit in a court of ordinary jurisdiction. The condition precedent to the application of section 235 is that the matter which is to be adjudicated on has to appear in the course of winding up. Again, one of the persons who may be proceeded against by a misfeasance suit is a liquidator. The argument of the learned counsel for the appellant has been that where a suit by the company would be barred against his client, an application by the liquidator under section 235 should be held to be barred. But where a subsequent liquidator wants to proceed against an earlier liquidator for misfeasance, can it be said that the company could have brought a suit for similar relief? There was no liquidator in existence when the company was in action, and therefore it is impossible to say that the liquidator proceeded against could plead that the suit would be barred if the suit on behalf of the company would have been barred.

Further, there is a word of great importance in sub-section (3) which has been overlooked. It is the word "such". The sub-section says that the Indian Limitation Act shall apply to an application under this section

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as if such application were a suit. Now, "such application" can only mean an application by the "creditor", or "contributory", or "liquidator". Therefore, the plaintiff for the purposes of this suit must be the applicant and not the company. There may be an application by the creditor; there may be an application by the contributory; there may be an application by the liquidator. In each case it is the creditor or the contributory or the liquidator who is to figure as the plaintiff, and not the company.

There is yet another answer to the arguments of the learned counsel for the appellant. He says that the application is to be deemed to be a suit by or on behalf of the company. As to the liquidator, it may be suggested that he is allowed to maintain an application or a suit in the name or on behalf of the company. This is stated in section 179, clause (*a*) of the Indian Companies Act. But what about the creditor? What about the contributory? Is a creditor entitled to maintain a suit in the name and on behalf of the company? Is a contributory entitled to maintain a suit in the name and on behalf of the company? At least I have not been able to find any warrant for such a proposition and none has been placed before us. The argument is that every one of these three is maintaining the application for the benefit of the company. This is undoubtedly true. But what was the necessity of mentioning the three individuals by name if it was going to be an application on behalf of the company? The persons vitally interested are allowed to come before the court and to seek its permission to maintain the application. The maintenance of the application may involve serious liability on the opposite party, and the legislature thought it fit to give the opposite party the benefit of the law of limitation. In England, as I have pointed out in my judgment in the unreported case, it was so late as in 1888 that trustees were allowed the benefit of the law of limitation. From 1623, when the

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law of limitation was enacted in England, trustees, and among them are included the directors of the company, were never allowed to plead limitation. Now in England trustees are in very favourable circumstances, because by the Act of 1888 the period of limitation is six years and the limitation starts from the date of the commitment of breach of trust. The Indian law, unfortunately for the directors and some others, so far as I can see, is different. When the Indian legislature borrowed broadly section 235 of the Indian Act from section 215 of the English Act of 1908, they took care to lay down that the Indian Limitation Act of 1908 would apply. It is possible that the legislature did not care to see what would be the significance of the application of the Indian Limitation Act when it was giving the creditor, the contributory and the liquidator a right to make the application. In England it was not necessary to enact the rule as to applicability of the law of limitation, because the rule of limitation had already been enacted as an independent Act in 1888. But the English law as to limitation and the Indian law on the same subject are different and it is not open to the Judges to legislate, simply because there may be some hard cases.

Mukerji, J.

A good deal of the argument of the learned counsel for the appellant has been based on an alleged hardship on the persons proceeded against. It was argued that suppose the promoter left the company thirty years ago, yet it would be open to the liquidator to proceed against him within six years of his appointment. This may be so, if the result of the application of the Limitation Act of 1908 be such. It may be a misfortune of the promoter, but that will not be any reason for our adding the words, "and in the name and on behalf of the company", to sub-section (3) of section 235. The legislature believed that it had given relief to the persons to be proceeded against in a misfeasance case by saying that it would be open to him to plead limitation. If,

as the result of judgments of the courts, it is found that the relief is not adequate, it would be open to the legislature to step in and to give further relief.

I may point out that it is open to the court to refuse to proceed where the claim of the official liquidator or the creditor or the contributory is stale. In the instance given by Dr. *Katju*, namely where a promoter has left the company thirty years ago, the court will probably refuse to investigate into the actions of the promoter. When the company had been in solvent circumstances for twenty years and nobody thought it fit to proceed against the promoters, the court would be justified in refusing an investigation. Then, section 281 of the Indian Companies Act provides some relief in certain cases. However, we cannot interpret the statute law on grounds of mere harshness or hard cases.

Then it was argued that if a contributory or a creditor or a liquidator, each comes forward with an application against, say, an ex-director, there may be different rules of limitation for different applicants, unless they are all treated as representing and applying on behalf of the company. I do not think that any such thing follows. In my own judgment in the unreported case I have shown why the several special articles of the Limitation Act do not apply and why article 120 has to be applied. Now I want to examine, article 120 being applicable, what would be the starting point of limitation and whether the starting point should necessarily be different in the case of different applicants, who according to my opinion, are to be treated as plaintiffs in suits, under sub-section (3) of section 235 of the Indian Companies Act. Under article 120 the starting point of limitation is the date "when the right to sue accrues". Interpreting very similar words used in article 181 of the Limitation Act of 1908, which are "when the right to apply accrues", their Lordships of the Privy Council

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in *Hansraj Gupta's case* (1) remarked as follows: "But even if article 181 does apply to it, the period of limitation prescribed by that article is three years from the time when the right to apply accrued, which time would be not earlier than the date of the winding up order, the 26th of March, 1926". In the opinion of their Lordships the time when the right to apply accrued could not be a date earlier than the date of the winding up order.

After giving my best considerations to the arguments of the learned counsel for the parties, I have come to the opinion, and this is slightly different from the opinion I expressed in the earlier cases, that the date when the limitation starts is the date of the winding up order and not the date of the appointment of the liquidator. In the two earlier cases already mentioned, *In the matter of Union Bank, Allahabad, Ltd.* (2) and *Official Liquidators, Jaunpur Sugar Factory* v. *Behari and Co.* (3), no arguments were addressed to me and to my brother Judges as to whether the date of the winding up order was the crucial date or the date of the appointment of the liquidator. The point was not in those cases material either. Why I should think that the date should be the date of the winding up order is this. When a winding up order is made it is not necessary for the court to appoint an official liquidator. The court may or may not appoint one; *see* section 178, sub-section (2) of the Indian Companies Act. Where the court does not appoint an official liquidator, it would still be open to a contributory or to a creditor to come and make an application under section 235. In article 120 in the third column the words are "when the right to sue accrues". This would not mean the right to sue as it accrues to the individual who is suing, but to him or to his predecessor in title or to any person generally who would be interested in instituting a suit. A right to sue within the meaning of section 235, sub-section (3)

(1) (1932) I.L.R., 54 All., 1067. (2) (1925) I.L.R., 47 All., 669.
(3) *See* pp. 947-60 *infra*.

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of the Indian Companies Act would accrue even if there were no liquidators, no creditors and no contributories. If this argument be correct, then the date when the right to sue accrues is definitely fixed for all possible applicants. The argument would thus fail that in the case of successive liquidators the date when the right to sue accrues would be different or the date when the right to sue accrues to a creditor or to a contributory may be different from the date when the right to sue accrues to a liquidator.

I have already spoken at length and I do not wish to prolong my judgment. I am of opinion that the only article applicable to an application like the one out of which the appeal before us has arisen is article 120 of the Indian Limitation Act.

See extract subjoined.

[The following is the extract from the judgment delivered by MUKERJI, J., in the unreported case, referred to above, namely *Official Liquidators, Jaunpur Sugar Factory* v. *Behari and Co.* (1).]

"The plea of limitation was argued as a preliminary point and it has to be decided before the merits can be gone into.

"The contention of Mr. *Iqbal Ahmad*, the learned counsel appearing for Nawab Muhammad Yusuf, is that article 36 of the Limitation Act applies to a claim like this and the starting point of limitation is the date when 'the malfeasance, misfeasance or nonfeasance took place'. The learned counsel further argues that if article 36 did not apply, article 115 or 116 would apply and, in either case, as more than six years have elapsed between the alleged misappropriation and misapplication etc. of the company's money, the application is time barred. The contention for the official liquidator is that article 120 of the Limitation Act applies and that the starting point of the limitation being, under that article, "when the right to sue accrues", such right to sue could accrue to the liquidator only on the date of his appointment. It was further urged on behalf of the official liquidator that if this contention be not right, article 90 would apply in so far as Behari and Co. were agents of the company and the starting point of limitation

(1) Mis. Case No. 119 of 1924, decided on the 27th of June, 1930.

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would be different dates according to the dates of the knowledge of the liquidator. For the respondent, Nawab Muhammad Yusuf, it has been argued that the liquidator can recover only what the company could recover, that section 235 of the Indian Companies Act 'creates no new rights' and that it only furnishes a summary method of realising what might otherwise have been realised by means of a suit.

Mukerji, J.

"Before we proceed to examine the arguments of the learned counsel for the respondent, it will be desirable to examine the language of the Act. For, it is the language of the Act and the language alone that should be our sure guide and it will not do to attempt to interpret the language employed by the legislature by running to see what anybody has said in respect of it.

"Section 235 of the Indian Companies Act, so far as it is material for our purpose, runs as follows: [The section was here quoted.]

"It will be noticed that in the particular cases mentioned in the section the liquidator, or creditor, or a contributory, has to make an application to the court for investigation into the conduct of certain persons connected with the company and the court may, after such investigation as may be called for, compel the persons into whose conduct the court has held an inquiry, to restore money or property misappropriated or to contribute such sum to the assets of the company by way of compensation as the court thinks just. It will be seen that the provision is that the money or property recovered is not to go to the pocket of any particular individual but is to go to augment the assets of the company. The court, naturally, has to be moved in the matter by somebody, as, if on an investigation of the conduct of the person who is charged with misconduct it turns out that the charge was false, somebody should be responsible for an unnecessary investigation. Thus, the provision is that the court is to examine into the conduct on being moved by any one or more of three persons, namely the liquidator or a creditor or a contributory. On a plain reading of the section, therefore, it ought to be abundantly clear that although the legislature has directed that for the purpose of limitation the application of the liquidator or a creditor or a contributory is to be treated as a suit, the provision is an extraordinary one and permits not only the liquidator, who is an officer of the court and whose duty primarily it is to recover the assets of the company and to distribute the same, but also authorises a creditor and a contributory to move the court.

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"The argument on behalf of the respondent is that in its nature the application under section 235 is a suit and, therefore, if a suit by the company to recover money or property be barred by time, an application by the liquidator or creditor or contributory should also be deemed to be barred by time. There does not seem to be any warrant in the language of the Act to suggest that the three persons mentioned can recover only where the company could recover and not otherwise. It goes without saying that a creditor or a contributory is not a representative of the company. An application, therefore, by either of these cannot be called an application (or a suit) by a representative of the company. On an examination of the provisions of the Indian Companies Act it will be found to be abundantly clear that a liquidator is in no sense a representative of the company. Section 175 of the Act says as follows: 'For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court may appoint a person or persons, to be called an official liquidator or official liquidators.' If this rule of law defines the position of an official liquidator, it is impossible to say that he is a representative of the company. Primarily, an official liquidator is an officer of the court. The object of his appointment is the conduct of the proceedings in winding up and further doing such duties with reference to the winding up as the court may impose. Where does then the representative character of the liquidator for the company come in? The liquidator looks after the interest of the company and he looks after the interest of the creditors of the company. Such a person can in no sense be called a representative of the company. If he might be called a representative of the company, he might with equal truth be described as a representative of the creditors of the company. Where no liquidator is appointed, *see* section 178(2), or during any vacancies of such appointment, all the property of the company shall be deemed to be in the custody of the court. It will be seen therefore that primarily it is the court in whose custody the property of a company under liquidation comes, and it is only by virtue of his being an officer of the court that the official liquidator is allowed to take into his custody all the property and effects, etc., of the company; section 178, clause (1). It will be noticed that there is a vast contrast between the position of an official liquidator and the position of a receiver in insolvency. In the receiver in

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insolvency the property of the insolvent is vested; section 28 of the Provincial Insolvency Act, 1920. But there is no similar provision in the Indian Companies Act by which the property of a company in liquidation may be vested in the official liquidator. It would therefore be wrong to say that the official liquidator is a representative of the company.

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"No authority would be needed to support this view of the law, but it is interesting to find that as early as in 1870 HATHERLEY, L. C., speaking of the English Act from which our Indian Act has been copied, said as follows with respect to the position of the official liquidator: 'The official liquidator, who, in that capacity, is bound to collect all the assets of the company and distribute them by the direction of the court among the creditors, is in a position in which he may assert rights as against the company, and assume a position against the members of the company which the company itself possibly might not be in a position to assert.' *See Waterhouse* v. *Jamieson* (1). It is true that at page 38 of the said report WESTBURY, L. J., quoted briefly a dictum of CAIRNS, L. J., in *In re Duckworth* (2), namely 'The liquidator represents the creditors only because he represents the company, and through the company the rights of the creditors are to be enforced.' But this statement, with all respect, is a loose one and is not supported, if we take the language strictly, by the provisions of the Companies Act, either English or Indian. A creditor's interest is vastly different from the interest of the debtor and indeed they are antagonistic. To say that the liquidator represents the creditors is to state only a partial truth. Again, to say that the official liquidator represents the company is only a partial truth. The fact of the matter is that from the very definition of an official liquidator he is neither a representative of the company nor a representative of the creditors. He is merely an officer of the court appointed by it for the purpose of 'effectually' conducting the proceedings in winding up; section 175, Indian Companies Act. The official liquidator has, by the very definition, to perform such duties as the court may impose; and although he has been given some powers, he can exercise many important powers only with the sanction of the court and not otherwise; section 179, Indian Companies Act. If the official liquidator were a representative of the company, surely he would not stand in need of

(1) (1870) 2 H.L.Sc., 29(32). (2) (1867) L.R., 2 Ch. App., 578.

the court's sanction to institute suits on behalf of the company or to defend suits on behalf of the company.

"Thus we find that none of the three persons who have been authorised by section 235 of the Indian Companies Act to move the court is a representative of the company. It would follow, therefore, without further reasoning, that if a suit by the company be time barred, it should not necessarily follow that a suit by the official liquidator or a creditor or a contributory should necessarily be time barred.

"The rule of limitation is a rule of procedure, a branch of the adjective law, and does not either create or extinguish rights, except in the case of acquisition of title to immovable property by prescription. Thus, where the recovery of a debt is barred by lapse of time, the right to the debt is not extinguished, and if the debtor, without being aware of the bar of time pays up, he cannot sue the creditor to refund the money to him on the ground that a claim for recovery of the debt had become time barred. Thus, the liability to pay the debt being there, in particular cases the legislature may think it fit to enact that what would be a bar to the company to recover a just debt would not be a bar to the liquidator or the creditor or to the contributory in what has been styled, for the sake of brevity, 'misfeasance proceedings'. Lord Halsbury in his Laws of England, volume 19, page 37, article 50, says the same thing about the character of the rules of limitation and says that they should be interpreted liberally.

"It is conceded that the Indian Companies Act has provided for recovery by the liquidator of calls which could not be enforced by the company for lapse of time and that a liquidator may recover from contributories debts payable by them to the company, although if the company attempted to recover the same it would be successfully met with a plea of limitation; *see* sections 156 and 186 of the Indian Companies Act. Thus, it cannot be said that the Indian Companies Act did not contemplate making provisions for recovery of moneys which could not be recovered by the company if it made an attempt to do so. On a plain reading, therefore, of the language of section 235 the official liquidator's contention would seem to be fully supported by it, namely that the application (or suit) by the official liquidator or creditor or contributory is entirely independent of considerations which might affect a suit brought by the company itself.

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"This would dispose of the first two contentions of the learned counsel for the respondent, namely that the liquidator is a successor in title of the company and he can recover only what the company itself could recover.

"The next contention of the learned counsel for the respondent is that section 235 'creates no new rights'. The words put into a pair of inverted commas have been quoted from several cases in which they have been used, and to appreciate those words one must look into the cases themselves in which they found expression. Three English cases in which these words occur have been laid before us and on an examination of these cases it will be found that none of these use the words in the sense in which the learned counsel for the respondent would want them to be interpreted. The learned counsel for the respondent would read the words, 'section 235 creates no new rights', in the sense that the liquidator and others can enforce their claims under section 235 only as a representative of the company and not by virtue of their being official liquidators or creditors or contributories. As I have said, an examination of these cases will amply show that the words have been used in the English cases only in this sense and this sense alone that section 235 (English section 165 of the Act of 1862, and 215 of the Act of 1908) does not enable any of the applicants (official liquidator or creditor or contributory) to recover what could not be recovered under the general law. In other words, where there is an act which creates a liability in a director, or a promoter or a manager and others enumerated in section 235, under the general rule of law, there alone can the official liquidator or a creditor or a contributory recover. For example, where an act of a director is innocent and his act does not make him liable to make any compensation, that director does not become liable simply because section 235 of the Companies Act enables a liquidator or a creditor or a contributory to make an application under that section. By way of illustration we may give this case. Suppose a director of a company has built a house for himself. The act of the director is entirely innocent and does not make him liable for any compensation to the company or to contribute to the assets of the company. A liquidator cannot apply under section 235 to the court for an investigation into the director's conduct and to recover from him any compensation. The simple reason is that by the act mentioned above, the director incurred no liability and section 235 does not create a liability

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where one did not exist from before. The words 'create no new rights' were never meant to be used in the sense in which the learned counsel for the respondent wants to utilise them for his own purposes as described above.

"Now we proceed to examine those three English cases in which the words have been used. The first case in order of time is that of *In re Canadian Land Reclaiming etc. Co.—Coventry and Dixon's case* (1). In this case two gentlemen were appointed directors and although the number of qualification shares for a director was 100, neither of them subscribed for any shares. The directors acted throughout honestly and it was not proved that their acts led to any loss to the company. JESSEL, M.R., who tried the case in the first instance, at page 668 found that the two directors were liable to contribute £500 each, being the value of one hundred shares, to the company, because in his opinion they were bound to have subscribed for shares of that value. On appeal the learned Master of the Rolls was reversed. JAMES, L.J., observed at page 670: 'It might be very right for the legislature to declare that where there is a qualification prescribed for the office of director, every person acting as a director should be held to have taken the number of shares constituting his qualification, but the legislature has not done so.' Having said so, the appellate court proceeded to see whether any such liability was created by section 165 (English Act of 1862). Then JAMES, L.J., remarked as follows: 'I am of opinion that that section does not create any new liability or any new right, but only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary procedure of the courts.' These words, namely 'section 165 does not create any new liability or any new right' must be read with the facts in connection with which they have been used and it would be fraught with the greatest danger to take the words out of the context and treat them as if they are of universal application, capable of being applied to any set of facts whatsoever. As we already stated, the learned Judges of the appellate court found that the fact that the directors had not subscribed to any shares did not entail on them any liability to pay for those shares. BAGGALLAY, L.J., at page 672 said: 'The circumstances under which these gentlemen accepted office as and acted as directors did not involve them in any contract whatever to take shares.' BRAMWELL, L.J., at page 673 said: 'To my

(1) (1880) 14 Ch. D., 660.

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mind, the liquidator has failed to show any damage at all.' This case, therefore, is no authority for the contention of the learned counsel for the respondent.

"The next case is *Cavendish Bentinck* v. *Thomas Fenn* (1). This was a case in which, speaking briefly, one of the directors sold his interest in a property to the company. When the company went into liquidation, the liquidator sought to recover damages from the vendor for having sold the property without having disclosed that he was the owner thereof. On the facts it was found that it had not been proved that the defendant (Fenn) had not disclosed that he was the owner of the property and it was also not proved that the price paid was in any way unfair. It was held that the defendant was not liable. It was in connection with these facts that it was stated by Lord MACNAGHTEN at page 669 that section 165 of the Companies Act of 1862 (English) 'gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity.' If we read in this very case the judgment of Lord HERSCHELL at page 662, we shall at once see what was the point under consideration and what was held by the House of Lords. His Lordship stated: 'In an action nominal damages may be recovered wherever a breach of duty is shown. But I certainly do not think that any such doctrine can be applied to the 165th section. The right which the 165th section gives is not given to the company, or the representative of the company with whom there is a contract, or as towards whom there is a duty or as regards whom there is a breach of duty; but the right under the 165th section is given to any liquidator or any creditor or contributory of the company. Now there is no duty or breach of duty to the company in respect of which a creditor or contributory can maintain an action, but he has a right to this extent that if owing to a misfeasance or breach of duty the funds of the company in which he is interested have been diminished, those funds shall again be made good and the assets of the company shall be recouped the loss which they have sustained.' Then his Lordship remarked: 'Under the 165th section such an application could only succeed where it could be shown that the breach of duty had resulted in loss to the funds and assets of the company.'

(1) (1887) 12 App. Cas., 652.

"Throughout the judgments of the four Lords Justices who took part in the case no suggestion has been made that a liquidator or creditor or contributory cannot recover if a suit by the company happens to be barred by time. This case also, therefore, does not support the contention of the respondent. On the other hand the remarks of Lord HERSCHELL at page 662 establish that a claim under section 165 (English Act of 1862) is different from a claim by the company.

"The last case on the point quoted to us is the case of *In re City Equitable Fire Insurance Co.* (1). The learned counsel for the respondent quoted the following words from page 507 in support of his argument: 'I desire to say, though this is not the first time that it has been said, that that section (215 of the English Act of 1908) deals only with procedure and does not give any new rights.' As in the other two cases already discussed, if the sentence relied on is taken without regard to the facts of the case in connection with which the words have been spoken, any use whatsoever might be made of them. POLLOCK, M.R., who used those words was considering whether one Mr. Lepine was acting honestly or was acting fraudulently. His Lordship says at page 506: 'No such chart was available to Mr. Lepine, and we have to take the books singly which were before him and the books, be it remembered, of the City Equitable Company only. It is not right to treat the evidence which is now before us and its significance as being plain in the years 1919, 1920 and 1921 to Mr. Lepine.' In the result, his Lordship exonerated Mr. Lepine from liability, on the ground of his acting honestly. By the words quoted his Lordship meant what has been said in the earlier cases (which are quoted by his Lordship), that where there was no liability apart from section 215 of the English Act, no liability existed if that section were applied.

"Thus we have seen that the three cases quoted on behalf of the learned counsel for the respondent do not support his contention.

"The next contention of Mr. *Iqbal Ahmad*, the learned counsel for the respondent, was that the English cases do not support the view of this Court taken in the case of *In the matter of Union Bank, Allahabad, Ltd.* (2)—a view which is supported by the counsel for the official liquidator—, that the

(1) [1925] 1 Ch., 407. (2) (1925) I.L.R., 47 All., 669.

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limitation runs from the appointment of the liquidator. The point of limitation has not been discussed in any of the English cases cited before us by Mr. *Iqbal Ahmad*. But he produces two cases and wants to support his argument by way of inference from them. The earlier case is *Leeds Estate Building and Investment Co.* v. *Shepherd* (1). In this case the company under liquidation made no profits, but the directors in every year from 1870 declared dividends at 5 per cent. and upwards. The case was against the directors and the auditor, one Mr. Locking. The claim was decreed against the directors who were held to have acted with an amount of care which had fallen short of the standard of care which they ought to have applied to the affairs of the company. As regards the auditor, he was allowed to plead the Statute of Limitation, 1888, and the claim was decreed against him in respect of two years only, viz. 1878 to 1880. It was argued by Mr. *Iqbal Ahmad* that it was never pleaded on behalf of the official liquidator before the English court that limitation began to run from the date of the appointment of the liquidator and that as the liquidation had been ordered in 1885 the claim for the earlier year also was within time. We will discuss the question of limitation in England after having stated the facts of the second case relied on by the learned counsel for the respondent. This case is *In re Lands Allotment Co.* (2). In this case there was a company by the name of Land Allotment Co., which was not allowed by its articles to invest its money in the shares of other companies. Under certain circumstances, however, and in good faith, the directors accepted the shares of another company in lieu of a debt owing to their own company. When the Land Allotment Co. went into liquidation, compensation was claimed from the directors who had allowed the investment. The directors pleaded the Statute of Limitations of 1888. It will be remembered that under that statute a trustee who is not acting fraudulently is allowed to plead limitation. It was held in this case that the directors were 'trustees' within the meaning of the Statute of Limitations and they would be protected by the rule of limitation if their act was not fraudulent. It was found that their act was not fraudulent and therefore they were found not to be liable for the investment. In respect, however, of another matter one of the directors, Mr. Brock, was held liable for a certain sum of money. It was argued that if limitation began to run only

(1) (1887) 36 Ch. D., 787. (2) [1894] 1 Ch., 616.

after the appointment of the official liquidator, there could be no question of limitation in the case. This argument leads us to consider the English law of limitation. The main Act of Limitation is that of 1623 and provides for only a few cases. Before the Statute of Limitation of 1888 was passed, *trustees were not allowed to plead limitation at all.* It will be noticed in passing that in India trustees, unless they come within the provisions of section 10 of the Indian Limitation Act, are allowed to plead limitation. In enacting the Statute of Limitation, Parliament had to provide for a starting point of limitation. It laid down by clause (*b*) of section 8: 'as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received . . .' Thus a starting point of limitation was provided by the Act. For an action for money had and received under the general statute, the period of limitation is six years and the starting point is the date of receiving the money. It has accordingly been held in England that the date from which limitation begins to run against a trustee is the date of the breach of the trust committed by the trustee. The cases are summarised in the text-books on the subject, and at page 260 of the second edition of Darby and Bosanquet's 'Statutes of Limitation' the result is put down as laying down the starting point to be the date of the breach of the trust, where a breach of the trust occurred, and in the case of negligent investment, from the date of the negligence and not from the date when the loss occurred to the *cestui que trust*. In Lord Halsbury's Laws of England, volume 19, at page 162, in article 333 the state of the law is mentioned to be the same. In this state of the law, the period from which limitation is to start being fixed, it mattered little who the plaintiff was; the period of limitation remained the same, as also the starting point of limitation.

"We cannot apply the English law of limitation to cases in India which possesses a complete Act of her own.

"It has been laid down in *Quinn* v. *Leathem* (1) that a case is an authority only for what it actually decides and is not an authority for the proposition which may seem to follow from the decision. On the question of limitation, therefore, the two cases just quoted above are no authorities, inasmuch as they do not profess to deal with the point of limitation. If the point

(1) [1901] A.C., 495 (506).

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of limitation had been discussed, we would have known on what ground the decision went. It is, therefore, not permissible to draw an inference only from the fact that the argument was not pressed that the starting point of limitation was the appointment of the liquidator.

"Before we leave this point, we may mention a case decided by their Lordships of the Privy Council. This case is *Ranodip Singh* v. *Parmeshwar Prasad* (1). In this case the father made an alienation in 1893 and the fourth plaintiff, being the youngest son of the alienor, was not born at the date of the alienation. It was held by their Lordships of the Privy Council that article 126 of the Limitation Act was the article that applied to the case, being meant to be applied to a suit 'by a Hindu governed by the law of Mitakshara to set aside his father's alienation of ancestral property.' According to the third column of article 126, the time from which the period begins to run is 'when the alienee takes possession of the property'. This date was taken to be the date of the alienation and their Lordships of the Privy Council said at page 169: 'The fourth plaintiff's subsequent birth on the 30th of November, 1909, did not create a fresh cause of action or a new starting point from which limitation should be reckoned.' Thus the date for the starting of the period of limitation being fixed and unalterable, although the fourth son had a right to sue for setting aside the father's alienation he had no remedy, as it was already barred to him on the expiry of 12 years of the start; and this was the case, although the plaintiff did not come into existence till seven years after alienation.

"Mr. *Iqbal Ahmad* relied on some Indian cases also and they are two cases decided by the Lahore High Court. One is *Bank of Mu'tan, Ltd.* v. *Hukam Chand* (2) and the other is *Bhim Singh* v. *Official Liquidator, Union Bank of India* (3). The learned Judges of the Lahore High Court in deciding these cases relied on the English cases already discussed by me, in which the remark occurs that section 165 of 1862 or 215 of 1908 did not create any new rights We have tried to show how dangerous it is to rely on a remark taken apart from the facts which led to it. Their Lordships of the Lahore High Court also relied on an Indian case, *Kumarpuram* v. *Pestonjee* (4). There JENKINS, C.J., quoted the expression that the misfeasance section (to call it shortly)

(1) (1924) I.L.R., 47 All., 165.
(2) (1922) 71 Indian Cases, 899.
(3) (1926) I. L. R., 8 Lah., 167.
(4) (1903) 5 Bom. L.R., 633.

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did not give new rights but simply provided a summary mode of enforcing rights which must otherwise have been enforced by a suit. The quotation read in connection with the facts of the cases in which it was made is unexceptionable and so it was in the Bombay case. JENKINS, C.J., quoted the expression only to see whether the application before him disclosed a case for investigation or not. In the result, the appellant before the court was held to be not liable and the claim against him was dismissed.

"Having disposed of the authorities relied on on behalf of the respondent, let us see what is the article of the Indian Limitation Act which we can apply.

"In order to see the suitable article out of the 183 articles provided by the Indian Act we have to see which is the most applicable. Before sub-section (3) of section 235 of the Indian Companies Act, 1913, was enacted, on the use of the word 'application' in the first sub-section it appears to have been held in *Connell* v. *Himalaya Bank* (1) that no rule of limitation applied. On the other hand, in *Ramasami* v. *Streeramulu* (2) it was held that the application was one which fell under the heading of 'applications' in schedule I of the Indian Limitation Act and not under the heading of 'suit'. This was a Letters Patent appeal and the learned single Judge had dismissed the application on the ground that it was barred by article 36 of the Indian Limitation Act. It was pointed out that it was an 'application' that was before the court and not a suit. It was probably owing to these decisions that the legislature declared that although what the liquidator, creditor and contributory produced before the court was in the shape of an application, it was to be treated as a suit and not as an application. In our opinion the third sub-section of section 235 has no significance beyond this. Before leaving this point, we may point out that in the Allahabad case just quoted, viz. *Connell* v. *Himalaya Bank* (1), it was held that to the special proceeding provided by section 214 of the Companies Act of 1882 article 36 of the Indian Limitation Act was not applicable.

"Now, coming to consider what is the most suitable article for what may be described as the 'liquidator's suit', article 36 of schedule I of the Limitation Act cannot possibly have any application to such a suit. The reason is that the liquidator was not in existence at the date of the alleged misfeasance or

(1) (1895) I.L.R., 18 All., 12. (2) (1896) I.L.R., 19 Mad., 149.

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malfeasance. Further, it would seem that the directors and the managing agents were acting under contracts and their acts which are being complained of are in the nature of breach of trust and not in the nature of torts independent of contract.

"Article 90 of the Limitation Act, which was applied in Lahore in *Daulat Ram* v. *Bharat National Bank* (1) and which was explained away in the later case of *Bhim Singh* v. *Official Liquidator, Union Bank of India* (2), does not apply. The liquidator does not stand in the relation of a principal towards either the directors or the managing agents.

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"Articles 115 or 116 do not apply because, from the very nature of the case, the remedy is being sought not on account of the breach of any particular contract as those articles contemplate. We may note here that if article 115 were applicable at all, article 116 would have applied inasmuch as the 'articles of association' is a registered document. There being no particular article which is applicable to the facts of the present case, the residuary article 120 is applicable. 'To suits for which no period of limitation is provided elsewhere in this schedule', the period of limitation is six years and the time from which the period begins to run is, 'when the right to sue accrues'. The right to sue can accrue only when three things are simultaneously in existence, namely, the act which gives rise to the right of suit, the presence of a plaintiff and the presence of a defendant. All the three matters come together when the official liquidator is brought into existence. In our opinion, therefore, article 120 applies to this case, as was held in *In the matter of Union Bank, Allahabad, Ltd.* (3)."

KING, J. :—I agree to the conclusions arrived at by the Hon'ble CHIEF JUSTICE substantially for the same reasons and have nothing to add.

BY THE COURT.—Our answer to the question referred to us is that the winding up order does not give a fresh start either to a liquidator, contributory or creditor for the purposes of limitation and that the relevant article of the Limitation Act, which would be appropriate according to the relief sought, would be applicable as if it were a suit brought for seeking the same relief on behalf of the company.

(1) (1923) I.L.R., 5 Lah., 27. (2) (1926) I.L.R., 8 Lah., 167.
(3) (1925) I.L.R., 47 All., 669.

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King

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Ordinance—Prosecution started under Ordinance—Expiry of Ordinance before conclusion of trial—Whether prosecution can be continued after the expiry—Emergency Powers Ordinance (II of 1932), *section* 21—*Special Powers Ordinance (X of* 1932), *section* 17—*General Clauses Act* (X *of* 1897), *sections* 6, 30—*Applicability to temporary Acts or Ordinances which expire automatically after a time—Criminal Law Amendment Act (XXIII of* 1932), *section* 20—*Criminal Procedure Code, sections* 435, 439—*Examining in revision, before conclusion of trial, whether the charge has been made out by the evidence.*

In March, 1932, a prosecution was started against the accused, and the Magistrate framed two charges, one under section 17 of the Special Powers Ordinance (No. X of 1932) read with section 21 of the Emergency Powers Ordinance (No. II of 1932) and section 80(2) of the Special Powers Ordinance, and the other under section 17(2) of the Criminal Law Amendment Act, 1908. Upon the framing of the charges the accused went up in revision, first to the Sessions Judge and then to the High Court, and obtained a stay of proceedings pending decision of the revision. By the time the revision came up for final hearing, both the Ordinances had expired.

Held, by the Full Bench, that the prosecution under the first charge could not continue after the expiry of the Ordinances and must be quashed.

An offence committed against an Ordinance or a temporary Act must be prosecuted and punished before the Ordinance or the temporary Act expires; and as soon as the Ordinance or temporary Act expires any proceedings which are being taken against a person will *ipso facto* terminate, unless any specific provisions are enacted for the continuance of such proceedings.

Section 6, read with section 30, of the General Clauses Act of 1897 provides for the continuance of proceedings in cases where an Act or an Ordinance is repealed by a subsequent Act or Ordinance; it has no application where a temporary Act or Ordinance has automatically expired.

*Criminal Revision No. 709 of 1932, from an order of Ganga Prasad Verma, Sessions Judge of Fatehpur, dated the 21st of September, 1932.

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Section 20 of the Criminal Law Amendment Act, 1932, has made express provision for the continuance of trials in respect of offences under certain specified sections only of the Special Powers Ordinance (No. X of 1932); section 17 or section 80(2) of that Ordinance is not included amongst the sections so specified. The legislature must be deemed to have intended that trials for offences under those sections of the Ordinance which are not specified in section 20 of the Criminal Law Amendment Act of 1932 should not be continued.

Held, also, with regard to the second charge, that at the stage at which the trial had reached, i.e. when only the evidence for the prosecution had been recorded and the charge framed, it would be very undesirable and inappropriate for the High Court to examine the evidence and decide whether the offence charged had been made out or not.

Mr. *S. N. Seth*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

SULAIMAN, C. J. :—This revision has been referred to a Full Bench by a Division Bench because it was considered that it involved an important question of law requiring an authoritative pronouncement.

It appears that after the promulgation of Ordinance No. II of 1932, called the Emergency Powers Ordinance, 1932, by the Governor-General, the same was extended to the United Provinces, and the Local Government extended its provisions to the districts of these provinces, including Fatehpur, on the 9th of January, 1932, and the power under section 4 of the Ordinance was delegated by the Local Government to the District Magistrate of Fatehpur some time before the 12th of January, 1932.

On the 12th of January, 1932, the District Magistrate of Fatehpur issued a notice, called an order, to the applicant, Babu Bans Gopal, under section 4 of the United Provinces Emergency Powers Ordinance No. II of 1932, prohibiting him from making any speech or instigating in any way non-payment of rents or attending any meeting and procession, and directing him to abstain from all acts conducive to lead to any kind of

disturbance or breach of public peace in Fatehpur district, and not to go outside the confines of the municipality without previous permission. This notice or order was served on the applicant on the 13th January, 1932.

On this very date, namely the 12th January, 1932, the Criminal Law Amendment Act, 1908, was extended to the United Provinces. This was followed by an order of the Local Government dated the 15th January, 1932, declaring the District Congress Committee of Fatehpur, among other bodies, to be an unlawful association within the meaning of the Criminal Law Amendment Act, 1908.

One Madan Mohan was arrested at a public meeting, which was being held at Bindki in the district of Fatehpur on the 21st January, 1932, and a document, Ex. D, is said to have been recovered from his person. This purported to bear the signature of the accused Bans Gopal and was addressed to a person named Sheo Shankar but bore no date. In consequence of the discovery of this document the accused, Babu Bans Gopal, was arrested and ultimately prosecuted. The case before the Magistrate came up about March, 1932, and was going on when Ordinance No. II of 1932 expired on the 3rd of July, 1932. Before the expiry of this Ordinance, Ordinance No. X of 1932 came into force on the 30th June, 1932.

After recording the evidence for the prosecution the Magistrate framed two charges against the accused,—one under section 17 of Ordinance X of 1932 read with section 21 of Ordinance II of 1932 and section 80(2) of Ordinance X of 1932, charging him that in spite of having been ordered to abstain from all acts conducive to lead to any kind of disturbance or breach of public peace, he committed such an act by sending the letter, Ex. D, in which he encouraged disobedience of orders of lawful authority, etc. The second charge is that the accused assisted in the management of an unlawful

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association, namely the "District Congress Committee of Fatehpur", and encouraged disobedience of orders of lawful authority, etc., by writing the letter Ex. D and committed an offence under section 17, sub-section (2) of the Criminal Law Amendment Act, 1908.

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The accused was called upon to enter upon his defence after the framing of the charge, but before leading any evidence in defence he went up in revision to the Sessions Judge who declined to interfere. He then came up to this Court and applied for a stay of the criminal proceedings. The revision was admitted and the proceedings were stayed and have remained stayed for all this time.

Two main points are urged in this revision before us. The first is that no charge could be framed under Ordinance No. II of 1932 after the said Ordinance had expired, and the second is that there is no legal evidence on the record to show that the District Congress Committee of Fatehpur existed on the material dates and that accordingly no charge could be framed. There was another point taken that section 80(2)(*c*) of Ordinance No. X of 1932 was *ultra vires* of the Governor-General of India inasmuch as in effect it extended the period of six months during which the previous Ordinance could have remained in force, but this ground has not been pressed before us.

In my opinion there is considerable force in the first contention. According to the English law, as a general rule, unless there is some special provision to the contrary, after a temporary Act has expired no proceedings can be taken upon it and it ceases to have any further effect. It would follow that an offence committed against a temporary Act must be prosecuted and punished before the Act expires, and as soon as the Act expires any proceedings which are being taken against a person will *ipso facto* terminate (see Craies on Statute Law, 3rd edition, page 342). A distinction also seems to have been drawn between an Act which is repealed

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and a temporary Act which expires, but this difficulty was removed to a considerable extent by the passing of the Interpretation Act of 1889. In England there is also the Acts of Parliament Expiration Act, 1808, which to some extent meets the difficulty caused by an offence being committed between the expiration of a previous Act and the coming into force of the new Act, which professedly continues the operation of the first Act.

Similar to the provision of section 38 of the English Interpretation Act we have section 6 of the General Clauses Act, 1897, under which when an Act repeals any previous enactment the repeal does not revive anything not in force or existing at the time of the repeal; or affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed. Section 30 of the General Clauses Act, as subsequently amended, now makes the Act applicable not only to the Acts of the Governor-General, but also to the Ordinances made and promulgated by the Governor-General under the Government of India Act. Thus the General Clauses Act would certainly be applicable to the two Ordinances in question, but section 6 is applicable to a case where a previous Ordinance has been "repealed" by a subsequent Ordinance or by a subsequent Act and would not necessarily apply to a case where a temporary Ordinance automatically expires after the period during which it

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is in operation is over. It follows that although section 30 makes the Act applicable to the Ordinances, section 6 has no application to such temporary Ordinances. Section 6 lays down that a penalty already incurred is not to be affected by the subsequent Act and that the penalty may be imposed as if no repealing Act had been passed. Obviously this section has no reference to the order of a competent court which has already enforced a temporary Ordinance which is subsequently repealed. Once a person has been convicted and sentenced it is altogether immaterial whether an Act on which the order of the court was based expires or is subsequently repealed. The continuance of the punishment is not in consequence of the operation of section 6 any longer, but is by virtue of the order of a competent court though it was based on the Act before it was repealed.

The learned Assistant Government Advocate has relied on the case of *Jogendra Chandra Ray* v. *Superintendent, Dum Dum Special Jail* (1) in which a Bench of the Calcutta High Court, at page 747, thought that although the provisions of section 6 of the General Clauses Act do not apply in terms to the case of a temporary statute the term of which has expired, it may reasonably be contended that they merely give statutory expression to a rule of construction which was already in existence and which applied with equal force to statutes that had been expressly repealed and to temporary statutes the terms of which had expired. In that case the question was whether an accused person, who was undergoing a sentence of imprisonment in consequence of his conviction under an Ordinance which had subsequently expired, should be let off. It seems that the point was not argued before the Bench that the continuance of the sentence was a result of the order of the court and not of the applicability of section 6 of the General Clauses Act.

(1) (1933) I.L.R., 60 Cal., 742.

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When an offence is committed under a temporary Ordinance, which is subsequently repealed before the accused has been committed, there is obviously considerable difficulty in convicting him even if a subsequent Ordinance incorporates that very offence, provided there is no provision therein for the continuance of previous proceedings. He cannot be convicted under the relevant section of the old Ordinance because at the time the court is to pass its order that Ordinance has ceased to exist. He cannot be convicted under the corresponding section of the new Ordinance because no offence was committed while this Ordinance has been in force. It is to avoid such an anomaly that there is a practice to have a clause in the new Ordinance which would ensure the continuance of proceedings already taken under the previous Ordinance. It is noteworthy that in section 80(2)(*c*) of Ordinance No. X of 1932 express provision was made that the new Ordinance shall operate to confer a power to continue a trial or proceeding under any provision of any of the Ordinances, specified in sub-section (1), which was pending at the time of the expiry of the said Ordinances, as if such trial or proceeding were a trial or proceeding begun under the corresponding section of the new Ordinance. This provision was quite general and would have kept alive all legal proceedings and trials started under any of the sections of the former Ordinance. But when this latter Ordinance was about to expire the Governor-General did not issue a fresh Ordinance embodying any provision similar to section 80(2)(*c*). In place of it the Criminal Law Amendment Act No. XXIII of 1932 was passed which contained a somewhat similar provision in its section 20, but that provision was very much restricted in its scope and it laid down that any person accused of the commission of an offence punishable under certain specified sections of Chapter VI of the Special Powers Ordinance of 1932 (No. X) may, notwithstanding the expiry of the said Ordinance, be tried and punished as if such offence were punishable

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under or by reason of the corresponding enactment of the new Act. It is to be noted that there was no reference to any of the other sections of the Special Powers Ordinance.

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The first charge is in respect of an offence committed under section 17 of Ordinance No. X of 1932 read with section 21 of Ordinance II of 1932 and section 80(2)(*c*) of Ordinance X of 1932, which are not sections in chapter VI referred to in section 20 of the Criminal Law Amendment Act. It is, therefore, clear that although the legislature has specifically provided that trials under the specified sections should be continued, the Act is silent as regards trials under any of the other sections.

The legislature must be presumed to be aware that section 6 of the General Clauses Act was inapplicable to Ordinances which expire automatically, and so trials under those Ordinances would not have been protected by section 6. It was thought fit to provide that trials under certain specified sections should be continued and completed in spite of the fact that the Special Powers Ordinance has expired. The necessary implication is that the ordinary rule, which makes it impossible to convict a person under a section of an Ordinance or a temporary Act which has expired, prevails as regards sections not specified in section 20 of the Criminal Law Amendment Act. It necessarily follows that it is impossible now to proceed with the trial of the accused so far as charges framed under such sections of the Ordinance of 1932 are concerned.

As regards the second point urged in revision it is contended that there is really no legal evidence on the record to show that the District Congress Committee in fact exists. No affidavit has been filed before us, and it is highly inappropriate at this stage to examine the evidence and decide whether there is any legal evidence at all.

The learned advocate for the accused has urged that inasmuch as after the declaration that the District

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Congress Committee of Fatehpur was an illegal body there is no presumption that the accused, or for the matter of that, any other member of that body continued to be a member, it must be presumed that the District Congress Committee has ceased to exist, and, without positive proof that it is continuing, no prosecution can go on. It is unnecessary to decide this point in this case, but I wish to guard myself against being understood to hold that in the absence of such positive proof there is presumption that a body which has been declared by Government to be illegal has in fact ceased to exist. I would, therefore, allow this revision in part and quash the criminal proceedings so far as the first charge is concerned, but not interfere with regard to the second charge.

MUKERJI, J. :—The facts of the case have been stated at length by the learned CHIEF JUSTICE and it is not necessary for me to state them again. Briefly, the applicant before us was charged before a Magistrate at Fatehpur under two heads. The first charge against him was that having written a letter, bearing no date, between 16th January, 1932, and 26th January, 1932, at Fatehpur, he disobeyed a certain direction given to him by an order dated the 12th January, 1932, by the District Magistrate of Fatehpur. It is said that by writing that letter the applicant contravened the law as laid down in section 21 of Ordinance II of 1932 and section 17 of Ordinance X of 1932.

The second charge against the applicant was that by writing the aforesaid letter he committed an offence under section 17(2) of the Indian Criminal Law Amendment Act, XIV of 1908.

The Magistrate has not yet decided the case, but as soon as the charge was framed the applicant went before the Sessions Judge with an application to revise the proceedings. The learned Sessions Judge having

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refused to interfere, the applicant came up before this Court and the matter has ultimately come before a Full Bench, having regard to the importance of the question raised.

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The first and the most important point for decision is whether the prosecution should now continue, having regard to the fact that both the Ordinances II and X of 1932 have expired. The contention for the applicant is that the trial is now impossible, having regard to the present state of the law.

Section 6 of the General Clauses Act of 1897 does not apply to Ordinances which have expired by lapse of time. Section 6 read with section 30 of the General Clauses Act applies to Acts and Ordinances which have been repealed. That is not the case here. No Ordinance has been repealed, the Ordinances mentioned have expired by lapse of time. Thus by virtue of section 6 of the General Clauses Act the trial cannot be continued.

Act XXIII of 1932, which received the assent of the Governor-General on 19th December, 1932, has taken to some extent the place of the expired Ordinances. This contains a provision that in respect of certain offences specified in section 20, notwithstanding the expiry of the Ordinance X of 1932 (which permitted the trial of offences committed under earlier Ordinances after their expiry), trial may be continued and the accused person may be punished. But this section 20 makes no mention of an offence under section 21 of Ordinance No. II of 1932 or section 17 of Ordinance No. X of 1932. It follows that the legislature never meant that trials for offences committed under the provisions of law other than those mentioned in section 20 of Act XXIII of 1932 should be continued.

In this view the trial on charge No. 1 of the applicant should not be continued.

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On the second charge we have been told that there is no evidence on the record sufficient for a conviction of the applicant. Although this Court has very great powers in respect of criminal trials, it has never been deemed desirable that the High Court should sift evidence and arrive at a conclusion one way or the other as to whether an offence has been committed or not, where the Magistrate has not yet pronounced his opinion on the facts and no appeal has been heard by the Sessions Judge. On this ground I would decline to interfere with the trial of the applicant on charge No. 2. I would not express any opinion as to the correctness or otherwise of a Bombay case, *Emperor* v. *Shripad Ramchandra Jog* (1), cited by the learned counsel for the applicant. It may lay down a good law, it may lay down a bad law, it may be applicable to the facts of the case or it may not be applicable,—the question not arising before us I have not considered the situation.

I entirely agree with the order proposed to be passed by the learned CHIEF JUSTICE.

KING, J. :—I also agree. The first charge against the applicant is in respect of an offence under section 21 of Ordinance No. II of 1932, read with section 17 of Ordinance X of 1932. As both these Ordinances have now expired, the question is whether the trial can proceed on the basis of this charge. Section 6 of the General Clauses Act, 1897, does not apply because the Ordinances in question have not been repealed but have expired automatically. Section 20 of the Criminal Law Amendment Act of 1932 has made express provision for the continuance of trials in respect of offences under certain specified sections of Ordinance No. X of 1932, but section 17 of that Ordinance is not included amongst the sections specified. In my opinion this is conclusive as showing the intention of the legislature

(1) (1930) I.L.R., 55 Bom., 484.

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that trials for offences under certain sections of Ordinance X of 1932 should be continued notwithstanding the expiration of that Ordinance, but that trials for offences under other sections of that Ordinance, which are not specified, should not be continued. The maxim of interpretation, "*Expressio unius est exclusio alterius*" is clearly applicable. We must take it that the legislature intended that the trial of offences under section 17 of Ordinance X should not be continued.

As regards the second charge I think it is unnecessary, and indeed improper, to express any opinion at the present stage. It remains to be seen whether the accused can be proved to have assisted in the management of an unlawful association, and I express no opinion on that point.

BY THE COURT:—This revision is allowed in part and the prosecution under the first charge is quashed without interfering with the trial under the second charge.

APPELLATE CIVIL

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Before Sir Shah Muhammad Sulaiman, Chief Justice, and Justice Sir Lal Gopal Mukerji

RAM SINGH (PLAINTIFF) *v.* DEO NARAIN AND OTHERS (DEFENDANTS)*

Pre-emption—Joint Hindu family—Sale by adult members—Whether a minor member entitled to pre-empt—Consent—Estoppel—Questioning validity of the sale in pre-emption suit.

On a sale of joint family property by the adult members of a joint Hindu family a minor member of the family brought a suit to pre-empt the sale. *Held*, that the suit did not lie; the principle of estoppel applied to the suit, inasmuch as a person in the position of a vendor could not pre-empt his own sale.

*Second Appeal No. 697 of 1930, from a decree of Rup Kishen Agha, Additional Subordinate Judge of Allahabad, dated the 24th of January, 1930, confirming a decree of Hardeo Singh, Munsif of East Allahabad, dated the 29th of April, 1929.

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In a joint Hindu family the *karta* can and does act in the interest of the entire family, and in such a case the fact that no consent could be given by the minor himself is immaterial.

In a suit for pre-emption the validity of the sale cannot be challenged; it has to be taken as a valid and good sale, because the suit for pre-emption is a suit for substitution only; and if the sale is valid and binding on the minor member, he cannot claim to pre-empt it, his position being that of a vendor.

Mr. *Ambika Prasad*, for the appellant.

Messrs. *Ram Nama Prasad* and *Kanhaiya Lal*, for the respondents.

SULAIMAN, C.J., and MUKERJI, J. :—This is a pre-emption appeal and the pre-emptor, who is the appellant before us, is a minor. The pedigree given in the written statement of the vendee, the defendant No. 1, is accepted by the learned counsel for the appellant. It shows that the elder brother of the appellant Ram Singh and the own paternal uncles of Ram Singh, namely Jang Bahadur Singh, Jagdeo Singh and Udant Singh, together with Bisheshar Singh, a distantly related collateral, sold the property in suit to the respondent, Deo Narain. Ram Singh claims pre-emption, and his suit failed because it was held that as a member of the joint Hindu family he had no right to maintain the suit.

In this Court it has been contended that Ram Singh, being a minor, is entitled to pre-empt, and, in the alternative, he is at least entitled to pre-empt the share of Bisheshar Singh.

On the question whether Ram Singh as a minor member of the family is entitled to pre-empt it has been urged that no consent could be given on behalf of Ram Singh by the members of his family. We are not prepared to accept this argument as sound. In a joint Hindu family the *karta* can always act and does always act in the interest of the entire family. In this particular case it has been found as a fact that Ram Singh

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is joint with his elder brother and his uncles. Ram Singh had challenged the validity of the transaction as a sale but had to give up the contention, and we presume, because he found that the sale was a good one. If the sale was binding on Ram Singh, certainly it cannot be said that Ram Singh is entitled to pre-empt the property although he cannot challenge the validity of the sale. In a suit for pre-emption the validity of the sale cannot be challenged. It has to be taken as a valid and good sale, because the suit for pre-emption is a suit for substitution only. Ram Singh has to accept all the risk, if any, which Deo Narain took in making a purchase, with Ram Singh as a minor member of the family. We are of opinion that the principle of estoppel as enunciated in the case of *Mohammad Najaf* v. *Badri Narain Prasad* (1) holds good.

The next point is that Bisheshar Singh's share may be pre-empted by Ram Singh, it being an admitted fact on the part of Deo Narain, the vendee, that Bisheshar Singh was separate from the other vendors. The plea could have some force but for the fact that we have not got sufficient material on the record to enable us to give the plaintiff the relief he now asks for. He never claimed this right to claim Bisheshar Singh's share alone either in the court of first instance or in the court of appeal. The result is that we do not know what is the share of Bisheshar Singh and what is the proportionate price which the vendee is to get for the share sold by Bisheshar Singh. In the circumstances we cannot allow a new point to be taken.

The result is that the appeal fails and is hereby dismissed with costs.

(1) [1929] A. L. J., 899.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Justice Sir Lal Gopal Mukerji

SHEO BALAK CHAUDHURI AND ANOTHER (DEFENDANTS) *v.* RAM SARAN CHAUDHURI AND ANOTHER (PLAINTIFFS)* 1933 *July*, 21

Agra Pre-emption Act (Local Act XI of 1922), section 21—Plaintiff with a higher right associating a co-plaintiff having an inferior right—Forfeiture of the superior right and relegation to the inferior right—Subsequent withdrawal of the co-plaintiff does not restore the superior right—"Class"—Agra Pre-emption Act (Local Act XI of 1922), section 12, sub-sections (1) and (3).

Upon a sale made in favour of strangers to the mahal, a suit for pre-emption was brought by three persons; the first two plaintiffs, who had not only a right of pre-emption as co-sharers in the mahal but had also a superior right of pre-emption as being related to the vendor within four degrees and descended from a common ancestor, had associated with themselves in the suit the third plaintiff who had only the inferior right of pre-emption as a co-sharer. During the pendency of the suit the vendees acquired a share in the mahal, which put them on the same footing as co-sharers with the plaintiffs; and according to the law at that time the right of pre-emption based on co-sharership could no longer be enforced. Thereupon, the third plaintiff withdrew from the suit and the first two plaintiffs amended the plaint so as to base their claim on the superior right derived from their relationship with the vendor. *Held*, that the suit must fail; according to section 21 of the Agra Pre-emption Act, where a pre-emptor possessing a superior right sues jointly with a pre-emptor possessing an inferior right, he shall have no higher right than the person with whom he sues. Accordingly the superior right, based on relationship, possessed by the first two plaintiffs was altogether lost by their associating the third plaintiff in the suit and it could not revive by the subsequent withdrawal of the third plaintiff from the suit.

The principle underlying section 21 is that if a person possessing a superior right is not prepared to pre-empt the sale on payment of the whole price but finds it necessary to join with him a person who has an inferior right, so that they may share

*Second Appeal No. 1088 of 1930, from a decree of Mohammad Ziaul Hasan, Second Additional District Judge of Gorakhpur, dated the 10th of April, 1930, reversing a decree of Zillur Rahman, Munsif of Gorakhpur, dated the 8th of April, 1929.

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in the pre-emption money to be deposited, he by his conduct gives up his superior right and lowers himself to the status of the person whom he joins. Having done so, his superior right is altogether lost, and the mere fact that at some subsequent stage the person joined is prepared to withdraw would not suffice for restoring to the former his superior right.

The word "class" referred to in section 21 does not necessarily mean one of the five classes mentioned in sub-section (1) of section 12, but must also include relations who have a preferential claim under sub-section (3) of section 12.

Mr. *Gadadhar-Prasad*, for the appellants.

Messrs. *Shiva Prasad Sinha* and *Mansur Alam*, for the respondents.

SULAIMAN, C. J., and MUKERJI, J. :—This is a defendants' appeal arising out of a suit for pre-emption. On the 29th of August, 1927, a sale deed was executed by one Jaisri in favour of Sheo Balak and Ram Sundar. On the 1st of September, 1928, a suit for pre-emption was brought by the plaintiffs respondents on the ground that they were co-sharers in the mahal, whereas the vendees were perfect strangers. At that stage there was no necessity for them to allege that there was any preferential right in the first two plaintiffs on account of relationship. During the pendency of the suit, namely on the 11th of September, 1928, the vendees obtained some share in the mahal under an exchange, which put them on the same footing as co-sharers with the plaintiffs. On this, Hari Shankar plaintiff No. 3 applied to withdraw from the suit, and the other plaintiffs applied for the amendment of the plaint so as to base their claim on their preferential right, as they alleged themselves to be descended from the common ancestor of the vendor and were within four degrees of him. The plaint was amended and Hari Shankar also withdrew from the suit. The first court decided the case on the 8th of April, 1929, dismissing the claim. The lower appellate court decreed the claim of the plaintiffs on the 10th of April, 1930.

In the meantime the Amending Act (Act IX of 1929) had come into force on the 27th of January, 1930, when the assent of the Governor-General was received.

The lower appellate court has come to the conclusion that the withdrawal of Hari Shankar did not in any way affect the rights of the other plaintiffs and that by joining Hari Shankar in the suit they had, under section 21 of the Agra Pre-emption Act, reduced their old status and could not be regarded as more than mere co-sharers with the vendor. But the learned Judge has gone on to hold that the result of the amendment of section 20 is that the defendants cannot claim to have acquired an interest sufficient to defeat the plaintiffs' claim.

Before the amendment it was held by a Full Bench of this Court in *Ram Saran Das* v. *Bhagwat Prasad* (1), that although section 20 was applicable only to transfers and acquisitions before the institution of the suit, section 19 was applicable to acquisitions made during the pendency of the suit, and that accordingly if a vendee acquired the status of a co-sharer equal to that of the plaintiff after the institution of the suit and before the decree came to be passed, he could successfully defeat the plaintiff's claim. In the present case the defendants on the 11th of September, 1928, became co-sharers and were on the same footing as Hari Shankar, and inasmuch as the other plaintiffs had joined him in the suit, they were entitled to defeat the claim of all the plaintiffs. This right acquired by the vendees was a substantive right and extinguished the preferential right as against them.

It is, however, urged that section 21 cannot apply to a case where one plaintiff, although belonging to the same class as the other plaintiffs, has an inferior right, because he is not a relation within four degrees from the common ancestor. We think that section 21 is

(1) (1928) I.L.R., 51 All., 411.

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intended to lay down (as is also suggested by the marginal note appended thereto) that where a pre-emptor possessing a superior right sues jointly with a pre-emptor possessing an inferior right, he shall have no higher right than the person with whom he sues. The word "class" referred to in this section does not necessarily mean one of the five classes mentioned in section 12, sub-section (1), but must also include relations who have a preferential claim under section 12, sub-section (3). The principle underlying this section is that if a person possessing a superior right is not prepared to pre-empt the sale on payment of the whole price but finds it necessary to join with him a person who has an inferior right, so that they may share in the pre-emption money to be deposited, he by his conduct gives up his superior right and lowers himself to the status of the person whom he joins. Having done so, his superior right is altogether lost, and the mere fact that at some subsequent stage the person joined is prepared to withdraw would not suffice for restoring to the former his superior right. Even before the amendment it used to be held that a defect of this kind cannot be cured by a subsequent amendment of the plaint.

Hari Shankar, although a member of the plaintiffs' family, was not within four degrees of the common ancestor of the vendor, whereas the other two plaintiffs were. At the time when the suit was brought the vendees were strangers, and all the three plaintiffs being co-sharers had a preferential right as against the vendees. But the right based on relationship could not be enforced, because Hari Shankar did not possess any such right. It was on account of the fact that Hari Shankar could not claim such a right that the vendees presumably obtained a deed of exchange so as to put themselves on the same footing as the plaintiffs. The mere fact that Hari Shankar

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subsequently withdrew would not help the other plaintiffs so as to enable them to claim now a preferential right based on their near relationship with the vendor. We are, therefore, of opinion that the effect of obtaining the exchange in September, 1928, was to put the defendants on the same footing as the three plaintiffs on that date, and a subsequent withdrawal of Hari Shankar or the passing of the Amending Act would not improve the position of the plaintiffs.

In the result, we allow the appeal and setting aside the decree of the lower appellate court dismiss the plaintiffs' claim for pre-emption. As the exchanges were obtained during the pendency of the suit, we direct that the plaintiffs should have their costs of the first court from the defendants vendees, but that they must pay the costs of the defendants vendees in the other two courts.

REVISIONAL CRIMINAL

Before Mr. Justice Kendall

EMPEROR *v.* KHAIRATI*

1933
July, 21

Criminal Procedure Code, section 162—*Statement of abducted girl, who had been taken to another town, recorded by the police of that town—Admissibility of such statement at the trial which was held where the abduction took place—Statement made in the course of an "investigation"—Criminal Procedure Code, sections* 4(*l*), 156 (1) *and* 181—*Jurisdiction.*

A girl was abducted from her husband's house in the Moradabad district, and a report was made at police station Amroha in that district. About four months later she was seen in the company of one of the accused in Delhi, in suspicious circumstances; and a constable took them to a police station in Delhi and the sub-inspector recorded the statement of the girl. At the trial, which took place in the Moradabad district, this statement was adduced in evidence by the prosecution.

*Criminal Revision No. 317 of 1933, from an order of Rup Kishen Agha, Sessions Judge of Moradabad, dated the 11th of April, 1933.

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Held, that the statement was inadmissible in evidence under section 162 of the Criminal Procedure Code. It was a statement made to a police officer in the course of an investigation; for, according to the definition of "investigation" in section 4(*l*) of the Criminal Procedure Code it includes the collecting of evidence by a police officer. It cannot be said that the police officer at Delhi could not have been "investigating" in the present case as he had no jurisdiction to do so; for, he had such jurisdiction under section 156(1) of the Code, inasmuch as by section 181(4) the offence could be inquired into or tried by a court at Delhi where the abducted person had been conveyed or detained.

Mr. *Shambhu Nath Seth*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

KENDALL, J. :—The applicant Khairati has been convicted by the Assistant Sessions Judge of Moradabad of an offence under section 366 of the Indian Penal Code and sentenced to three years' rigorous imprisonment. The conviction and sentence have been upheld by the learned Sessions Judge. The present application is made on the ground that both courts have convicted the present applicant, who was put on his trial with several others, on the strength of a statement made by Mst. Naziran to the sub-inspector of the police station in Delhi, whereas it is argued that the statement was inadmissible under section 162 of the Code of Criminal Procedure. No objection appears to have been taken to the admission of the statement in the trial court. It was proferred in evidence by the prosecution and it was also used on behalf of the defence in order to shake the testimony of the witness by showing that there were discrepancies between her statement made in court and the statement made to the police.

It appears that the case for the prosecution was that the girl was taken away from her husband's place in the Moradabad District and that some four months

later she was seen with Jahana (one of the persons convicted in this case) in Delhi in circumstances that aroused the suspicion of a constable, who took both of them to the thana and made a report. After receiving the report of the constable the sub-inspector recorded the statement of the girl. It was this statement that was afterwards produced in court to corroborate the testimony of the girl.

The question of admissibility of the statement was raised in the lower appellate court, but the learned Judge, after discussing the matter at some length, came to the conclusion that as the statement was made to a police officer at Delhi, who "had no business to investigate an offence, of the commission of which a report had been made long before at Amroha and which was therefore liable to be investigated by the police there", section 162 of the Code of Criminal Procedure would not exclude it from evidence. Section 162 provides: "No statement made by any person to a police officer in the course of an investigation under this chapter shall . . . be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made." An "investigation" has been defined in section 4(*l*) of the Code of Criminal Procedure as including "all proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf." It can hardly be denied that in recording the statement of the girl and the statement of the constable the sub-inspector was proceeding to collect evidence, but the Sessions Judge has remarked that he cannot have been investigating in the present case because he had no jurisdiction to do so. It has been pointed out, however, that under section 156(1) of the Code of Criminal Procedure "an officer in charge of a police station

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may . . . investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of chapter XV relating to the place of inquiry or trial"; and turning to chapter XV we find in clause (4) of section 181: "The offence of kidnapping or abduction may be inquired into or tried by a court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was *conveyed or concealed or detained.*" The court at Delhi could, therefore, have inquired into or tried the case, and the sub-inspector in charge of the police station at Delhi could have investigated the case, and consequently it is not correct to say that he had no jurisdiction to investigate the case or that his proceedings cannot have been an investigation because he had no jurisdiction.

I am therefore decidedly of opinion that this statement was not admissible in evidence. The next argument of Mr. *S. N. Seth* is that the trial court has made it clear that if the statement of the girl in court had not been corroborated by her statement made to the police, the applicant, at any rate, could not have been convicted. The trial court after reviewing the evidence for the prosecution remarked: "This oral evidence would not by itself have sufficed to prove the case for the prosecution, but to my mind a very strong and reliable piece of evidence is the statement of Mst. Nazir Bi herself which she made to the police at New Delhi in October, 1932, when she was arrested." The lower appellate court has remarked: "The trial Judge had therefore no option but to discard almost the whole of the prosecution evidence as affording sufficient foundation for holding any of the accused other than Jahana guilty of the offence"; and it was only because the lower appellate court felt justified in admitting the

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statement recorded by the police and in relying on it that it was able to maintain the conviction.

The result is that the application must be allowed, and I therefore set aside the order of conviction and sentence passed by the Sessions Judge of Moradabad and direct that the applicant be acquitted.

APPELLATE CIVIL

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Bennet

RAM KATORI AND ANOTHER (DECREE-HOLDERS) *v.* SHAFIQ AHMAD AND ANOTHER (JUDGMENT-DEBTORS)*

1933
July, 24

Civil Procedure Code, order XLI, rule 6(2)—Appeal from preliminary decree for sale—No appeal filed from final decree—Application for execution of final decree may be stayed pending decision of the appeal from preliminary decree—"Such decree" includes the preliminary decree.

During the pendency of an appeal from a preliminary decree for sale on a mortgage the final decree was passed and the decree-holder applied for execution, praying for sale of the properties. *Held* that the sale could be stayed, under order XLI, rule 6(2) of the Civil Procedure Code, until the disposal of the appeal. Although no appeal was pending from the final decree which was being executed, yet the sub-rule would apply, because if the appeal from the preliminary decree was allowed, not only that decree but also the final decree would be set aside.

A final decree is based on a preliminary decree and contains within itself the adjudication between the parties which has already been made in the preliminary decree, and to that extent an appeal against a preliminary decree is also by implication an appeal against a final decree, although it is not an appeal in express terms against a final decree.

Mr. *Vishwa Mitra*, for the appellants.

Mr. *Panna Lal*, for the respondents.

MUKERJI and BENNET, JJ. :—This is an execution first appeal by the decree-holders against an order of the execution court dismissing the application for

*First Appeal No. 191 of 1932, from a decree of P. N. Agha, Additional Subordinate Judge of Moradabad, dated the 27th of February, 1932.

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execution by sale of the mortgaged property. The facts are that there was a preliminary decree for sale on a mortgage deed, and a first appeal has been taken against that preliminary decree. Subsequently a final decree had been prepared for sale and the decree-holders applied for execution of this final decree. The order in question is that as an appeal was pending from the preliminary decree and further property in addition to the mortgaged property had been attached by the decree-holders, the sale should not be allowed, and the execution application for sale was dismissed with costs. A preliminary objection was taken that no appeal lay. As the order definitely states that the execution application is dismissed, we consider that it is an order under section 47 of the Civil Procedure Code and an appeal does lie. The proper procedure for the execution court would be to act under the provisions of order XLI, rule 6, sub-rule (2). That rule states that the court may stay execution "on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of". It was, however, argued that there is no appeal against the final decree. The language used in the sub-rule is "and an appeal is pending from such decree". We consider, however, that the sub-rule will apply, because if the appeal is allowed, not only the preliminary decree will be set aside but the final decree will also be set aside. This, no doubt, is giving an extension to the literal meaning of the words quoted. But we consider that by implication those words must be taken to govern the present case. A final decree is based on a preliminary decree and contains within itself the adjudication between the parties which has already been made in the preliminary decree, and to that extent an appeal against a preliminary decree is also by implication an appeal against a final decree, although it is not an appeal in express terms against a final decree.

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We consider that the order of the execution court is not correct in dismissing the execution application, as order XLI, rule 6, sub-rule (2) only empowers the court, against whose decree an appeal is pending, to stay the application for execution and not to dismiss it. And the order of costs is not justified.

Accordingly we allow this appeal to this extent that we set aside the order of the lower court dismissing the execution application with costs and instead we grant an order for stay of the execution application and we direct that that stay will be granted on such terms as to giving security or otherwise as the lower court thinks fit, having regard to the terms of order XLI, rule 6, sub-rule (2)

APPELLATE CRIMINAL

Before Mr. Justice King and Mr. Justice Collister

EMPEROR *v.* TOHFA AND OTHERS*

1933
August, 1

Indian Penal Code, section 186—*Obstructing public servant in making an attachment—Threats accompanied by show of physical force—Civil Procedure Code, order XXXVII, rule* 5—*Warrant of attachment before judgment not accompanied by notice to show cause or furnish security—Warrant illegal —Resistance thereto no offence.*

A commissioner appointed by a civil court to make an attachment before judgment went to the house of the defendant, accompanied by the plaintiff and his pairokars, to effect the attachment. The warrant of attachment, issued under order XXXVII, rule 5 of the Civil Procedure Code, neither contained nor was accompanied by a notice to the defendant to furnish security or to show cause against the attachment. When the party reached the defendant's house, he and his sons came out of the house armed with lathis; they adopted an offensive attitude and said they would never allow attachment to be made and would break the head of any one who should point out the

*Criminal Appeal No. 14 of 1933, by the Local Government, from an order of Tirloki Nath, Sessions Judge of Meerut, dated the 26th of October, 1932.

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property; and they removed some cattle. The commissioner, apprehending that an assault might be committed, retired.

Held that the action and attitude of the defendant and his sons amounted to obstructing a public servant, within the purview of section 186 of the Indian Penal Code, and "physical" obstruction was not necessary. Although mere threats by themselves would not in all cases amount to obstruction, they would so amount where they were accompanied either by an overt act or by a menacing attitude or show of physical force, e.g. the exhibition or flourishing of some kind of weapon capable of inflicting physical injury. *Emperor* v. *Aijaz Husain* (1) and *King-Emperor* v. *Gajadhar* (2), distinguished.

Held, further, that inasmuch as the warrant of attachment did not contain, nor even was accompanied by, a notice to the defendant to furnish security or to show cause against the attachment being made, the warrant was in contravention of order XXXVII, rule 5 and of Form No. 5 in Appendix F of the Civil Procedure Code, and was therefore illegal; and resistance or obstruction to the execution of the illegal warrant was not an offence under section 186 of the Indian Penal Code.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Mr. *Chandra Bhan Agarwal*, for the accused.

KING and COLLISTER, JJ. :—Tohfa and his two sons Harbans and Chandar were convicted by a Magistrate of the Meerut district on a charge under section 186 of the Indian Penal Code. On appeal they were acquitted by the Sessions Judge. This is an appeal on behalf of the Local Government against their acquittal.

The facts of the case are not in dispute. One Abdulla sued Tohfa in the Munsif's court at Ghaziabad on the basis of a promissory note. He filed his suit on the 10th of February, and on the 13th of February he applied to the court for attachment before judgment under order XXXVII, rule 5. The Munsif allowed the application in the following terms: "Let notice go to the defendant to show cause why the application be

(1) (1916) I.L.R., 38 All., 506. (2) (1910) 7 A.L.J., 1174.

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not allowed. Interim attachment meanwhile. Let B. Onkar Nath, vakil, do the work of attachment." Accordingly, on the 15th of February B. Onkar Nath went to Tohfa's village accompanied by the plaintiff in the suit and his pairokars. Tohfa and his sons came out of the house armed with lathis. They adopted an offensive attitude and said that they would never allow attachment to be made and that they would break the head of anyone who should point out the property. At the same time they removed three head of cattle. The commissioner, apprehending that an assault might be committed, thereupon retired; but when he had gone a short distance, he heard cries and, on looking round, he saw that one of the plaintiff's men had actually been assaulted by Chandar.

The learned Sessions Judge has disagreed with the Magistrate and has acquitted the three respondents on the ground that for a conviction under section 186 of the Indian Penal Code it must be shown that there was "physical" obstruction. He has relied on three rulings. The first is a single Judge ruling of the Lahore High Court, *Mt. Darkan* v. *Emperor* (1); but the facts of that case were quite different from the facts of the case before us. All that happened in that case was that a woman against whom a warrant of attachment had been issued abused the process server and said that she would not allow him to attach her cattle. There is nothing to show that her attitude was such as to give rise to an apprehension of assault; nor does the judgment show that she actually stood in the way of the process server in order to bar his advance and prevent him from carrying out his duty. The next case is a single Judge case of this Court, *Emperor* v. *Aijaz Husain* (2). That was a case under section 225B of the Indian Penal Code. All that was proved in it was that the person whose arrest was being sought said to

(1) A.I.R., 1928 Lah., 827. (2) (1916) I.L.R., 38 All., 506.

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the process server: "Take me if you can to the tahsil; I won't go." The Court remarked in its judgment that "something more than evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest is required." The third case on which the Sessions Judge has relied is the case of *Matu Ram* v. *Emperor* (1). That was a single Judge decision of the Lahore High Court and the facts of the case were quite distinguishable from the case before us. The naib-tahsildar of income-tax invoked the aid of some lambardars against certain mahajans. The latter assaulted the lambardars and it was held that there was no obstruction to the naib-tahsildar within the meaning of section 186 of the Indian Penal Code. Another case to which our attention has been drawn in this connection is the case of *King-Emperor* v. *Gajadhar* (2). In that case a warrant had been issued for the arrest of the accused. The accused did not allow the chaprasi to execute the warrant and ran inside his house and locked the door. It was held that this was merely an act of passive resistance and did not amount to obstruction. The learned Government Advocate has drawn our attention to a ruling of the Calcutta High Court in the case of *Nafar Sardar* v. *Emperor* (3). At page 160 the learned Judge remarked as follows: "It seems to me, however, that the question of whether an offence under section 186 of the Penal Code has or has not been committed must depend upon the peculiar facts and circumstances of each case. No doubt, in some instances mere threats may not of themselves be sufficient. The real question is whether the action or attitude on the part of the persons alleged to have obstructed a public servant in the performance of his functions was of such a nature as to obstruct, that is to say, to stand in the way so as

(1) (1922) 73 Indian Cases, 338. (2) (1910) 7 A.L.J., 1174.
(3) (1932) I.L.R., 60 Cal., 149.

to prevent him in carrying out the duties which he had to discharge. Where it is solely a matter of threats, they must be of such a nature as so to affect the public servant concerned as to cause him to abstain from proceeding with the execution of his duties. It seems to me obvious that threats of violence, made in such a way as to prevent a public servant from carrying out his duty, would easily amount to an obstruction of the public servant, particularly if such threats are coupled with an aggressive or menacing attitude on the part of the persons uttering the threats and still more so if they are accompanied by the flourishing or even the exhibition of some kind of weapon capable of inflicting physical injury. Threats made by a person holding an offensive weapon in his hand must be taken to be just as much an obstruction as that caused by a person actually blocking a gateway or handling a public servant in a manner calculated to prevent him from executing his duty."

In our opinion the above quotation correctly states the principle to be applied to cases of this sort. It may be accepted that mere threats by themselves would not in all cases amount to obstruction unless they were accompanied either by an overt act or by a show of physical force.

Counsel for the respondents has accepted this position. He concedes that if the evidence proves that the menacing attitude of the respondents and their threats were directed against the commissioner, the conviction would be legal; but he pleads that the threats were made to persons other than the commissioner and that therefore there was no obstruction to a public servant within the meaning of section 186 of the Indian Penal Code. B. Onkar Nath's evidence, which is accepted by the defence as correct, shows that Tohfa and his sons were armed with lathis, that they threatened to break the head of anyone who pointed out the property and

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that they told witness and the others that they would not allow attachment to be made. They were apparently confronting the commissioner and his party and opposing their advance and the latter had reasonable grounds for anticipating resistance; and the only reasonable inference which can be drawn from the evidence is that they were obstructing the commissioner from executing his warrant. This conclusion is in accordance with common sense and the plain meaning of words. We are therefore clearly of opinion that in the absence of some other reason to the contrary, the respondents would have to be convicted under section 186 of the Indian Penal Code.

A plea has been raised before us, however, by counsel for the respondents that the warrant which was issued to B. Onkar Nath was illegal and it is therefore pleaded that the respondents committed no offence. This plea was contained in the memorandum of appeal before the Sessions Judge, but it has not been referred to in his judgment and it is not therefore clear whether it was actually argued before him or not.

The learned Government Advocate concedes that, according to the recent rulings of this Court, resistance or obstruction to the execution of an illegal warrant is not an offence under section 186 of the Indian Penal Code. The most recent case is that of *Emperor* v. *Fattu* (1). In that case a warrant of arrest had been issued against a certain person, but his name and description had not been given in the warrant. He resisted arrest and it was held by a Bench of this Court that no offence had been committed, even though he did not know of the omission of his name and description from the warrant.

The point for us to decide, therefore, is whether the warrant which was issued to B. Onkar Nath was or was not illegal. The wording of order XXXVII, rule 5 and of Form No. 5 in Appendix F shows that the

(1) (1932) I.L.R., 55 All., 109.

legislature intended that the notice to the defendant to furnish security or to show cause against it, and the order for the conditional attachment of his property, should be issued simultaneously and on one and the same form. In the present case the only document on the record in pursuance of the Munsif's order of the 13th of February is a manuscript warrant to the commissioner for the attachment of Tohfa's property. The learned Government Advocate argues that it must be assumed from the Munsif's order of the 13th of February that a separate notice was issued to Tohfa calling upon him to give security or to show cause against doing so. In the order sheet we find the words "*nawishta shud*", from which we are asked to presume that both the warrant of attachment and also the notice about security were separately written and issued in accordance with the Munsif's order. It is argued that the issuing of separate orders, though irregular, would not be illegal. But there is no copy on the record of any such notice to the defendant about security. The words "*nawishta shud*" may therefore have referred only to the warrant of attachment. Moreover, we observe that in the Munsif's order in the order sheet it was stated that notice should be issued to the defendant to show cause *why the application for attachment before judgment should not be allowed;* it does not appear that any notice was to be issued to him about the furnishing of security. In our opinion this omission and the doubt which exists as to whether in fact anything was done in pursuance of the order of 13th February except the issuing of a warrant of attachment to the commissioner must be held to render the warrant illegal. Even if a notice relating to security was in fact issued to the defendant, it is clear that it was not consolidated with the order of attachment and therefore the requirements of the law were not fulfilled. The reason why the order about security and the order of attachment are required to be on the same

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form is obvious. It is that the defendant may know at one and the same time (1) that he is required to give security, or show cause against it, (2) that his property is being meanwhile attached as security, and (3) that he may have the attachment raised by complying with the court's order about furnishing security or showing cause. It was held in a Punjab case, *Prabh Dyal* v. *King-Emperor* (1), that when a warrant of attachment was issued which was defective in certain respects, one defect being the omission to state the amount of security which was demanded from the defendant, resistance to the execution of such warrant did not amount to an offence under section 183 or 186 of the Indian Penal Code. This view is in accordance with the view which we take in this case.

Since we have found that no legal warrant was issued under order XXXVII, rule 5, it follows that on this technical ground the acquittal must be upheld; although we are clearly of opinion that the facts which have been proved would otherwise have amounted to an offence under section 186 of the Indian Penal Code and that the grounds on which the Sessions Judge allowed the appeal were wrong. We accordingly dismiss this appeal.

(1) [1905] Punj. Rec. (Crl. J.), No. 49.

PRIVY COUNCIL

KHALIL-UR-RAHMAN KHAN (JUDGMENT-DEBTOR) *v.* COLLECTOR OF ETAH (DECREE-HOLDER)

*J. C.** 1933 *November*, 24

[On appeal from the High Court at Allahabad.]

Limitation Act (IX of 1908), article 182(5)—Execution of decree—Successive applications—Limitation—Previous application alleged not bona fide.

An application to execute a decree, or to take a step in execution, made in accordance with the Code of Civil Procedure, to the proper court, and within the time prescribed, operates under the Indian Limitation Act, 1908, article 182 (5)—if made before January 1, 1928, when Act IX of 1927 came into force—to extend the time for executing the decree, whether or not the application was made with the genuine intention to proceed to execution.

Kayastha Company, Ltd. v. *Sita Ram Dube* (1), approved; *Sheo Prasad* v. *Naraini Bai* (2), disapproved.

Judgment of the High Court affirmed.

Appeal (No. 134 of 1931) from a decree of the High Court (June 24, 1930) affirming a decree of the Subordinate Judge of Etah (April 22, 1929).

On August 30, 1928, the respondent applied to the Subordinate Judge for execution of a decree, dated July 29, 1922, being a final decree upon a mortgage. Previous applications to execute the decree had been made on June 2, 1925, and July 8, 1926, and had been struck off on August 14, 1925, and September 16, 1926, respectively.

The appellant, the successor to the judgment-debtor, objected (1) that the mortgage upon which the decree had been made was invalid for reasons not material to this report; (2) that the application was barred by limitation.

The facts appear from the judgment of the Judicial Committee.

*Present: Lord THANKERTON, Lord ALNESS, and Sir LANCELOT SANDERSON.

(1) (1929) I.L.R., 52 All., 11. (2) (1925) I.L.R., 48 All., 468.

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The High Court, affirming the Subordinate Judge, held that both objections failed. The learned Judges (MUKERJI and BANERJI, JJ.) held as to the second objection (which alone was contended for upon the present appeal) that the application was not barred, having regard to the previous applications and the decision of the Full Bench in *Kayastha Company, Ltd.* v. *Sita Ram Dube* (1).

1933. November, 2. *Sir Dawson Miller, K.C.*, and *Jinnah* for the appellant: The application was more than three years after the date of the decree and therefore was barred under the Indian Limitation Act, 1908, article 182 unless the applications in 1925 extended the time. Those applications, however, were not made *bona fide* with the intention of executing the decree, but were made merely for the purpose of extending the time. They were consequently not applications to which article 182(5) applies: *Sheo Prasad* v. *Naraini Bai* (2). The judgments of the Privy Council there referred were on differently worded provisions, but the principle applied justified the decision. The Limitation Act of 1871, in the corresponding article, referred to an application "to keep in force" a decree, but that expression was omitted in the Acts of 1877 and 1908. It is conceded that the decision of the Full Bench in *Kayastha Company, Ltd.* v. *Sita Ram Dube* (1) conflicts with the appellant's contention, but it is submitted that the view adopted in *Sheo Prasad's* case (2) is to be preferred. Act IX of 1927, which amended article 182(5) as from January, 1928, does not affect the present argument, as the question still is whether the proceedings in 1925 were applications to which the article applied. [Reference was made also to *Hira Lal* v. *Badri Das* (3), and *Roy Dhunpat Singh* v. *Mudhomotee Dabia* (4).]

(1) (1929) I.L.R., 52 All., 11.
(2) (1925) I.L.R., 48 All., 468.
(3) (1880) I.L.R., 2 All., 792; L.R., 7 I.A., 167.
(4) (1872) 11 Beng. L.R. (P.C.), 23.

De Gruyther, K.C., and *Wallach*, for the respondents having referred to *Nagendra Nath De* v. *Suresh Chandra De* (1), were not further called upon.

November, 24. The judgment of their Lordships was delivered by Sir LANCELOT SANDERSON :—

This is an appeal from an order and judgment of the High Court of Judicature at Allahabad, dated the 24th of June, 1930, confirming the order of the Subordinate Judge of Etah, dated the 22nd of April, 1929, in the matter of the execution of a final decree for sale, dated the 29th of July, 1922, in a mortgage suit.

The appellant is the successor of Abdul Jalil Khan, a zamindar of Aligarh, who died on the 4th of October, 1923.

The material facts are as follows: Abdul Jalil Khan in 1909 or 1910 borrowed money from various people, and several decrees were made against him. The decrees were simple money decrees, and the property, which was attached in execution of the decrees, being ancestral property, the execution proceedings were transferred to the Collector in accordance with the provisions of section 68 of the Code of Civil Procedure. On the 29th of August, 1911, the Collector, as he was entitled to do, granted a lease to Habib-ur-Rahman Khan of the property belonging to the judgment-debtor, Abdul Jalil Khan, for a term of seventeen years. During the pendency of the said lease, which expired on the 1st of July, 1928, Abdul Jalil Khan on the 25th of September, 1914, executed a mortgage of the said property for Rs.15,000 in favour of Rao Maharaj Singh. In this appeal Rao Maharaj Singh is represented by the respondent, the Collector of Etah, who is in charge of his estate.

On the 25th of October, 1920, the Collector of Etah filed a suit, based on the above-mentioned mortgage, against Abdul Jalil Khan, and obtained a preliminary

(1) (1932) I.L.R., 60 Cal., 1; L.R., 59 I.A., 283.

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decree on the 9th of March, 1921, which was made final on the 29th of July, 1922. Both the decrees were made *ex parte* after due notice had been served upon Abdul Jalil Khan.

In the courts in India it was argued on behalf of the appellant that the mortgage was illegal, that the decree obtained on the basis thereof was not enforceable at law, that the decree was obtained in contravention of the provisions of clause 11(1) of the Third Schedule of the Code of Civil Procedure, and that it was incapable of execution. Though these points were taken in the appellant's case, they were not relied on before the Board by the learned counsel for the appellant, and the only arguments presented to the Board were in relation to the other point, which was based upon the Limitation Act.

The appellant alleged that the application for execution, in respect of which the above-mentioned order of the Subordinate Judge, dated the 22nd of April, 1929, was made, was barred by the law of limitation inasmuch as certain previous applications, dated the 2nd of June, 1925, and the 8th of July, 1926, were not steps in aid of execution so as to save limitation.

It was further argued on behalf of the appellant that the said previous applications were not *bona fide* and were not taken with the intention of executing the said decree, but were merely for the purpose of gaining time, and that consequently the application in question was barred by the law of limitation.

The material facts in relation to this point are as follows:

On the 2nd of June, 1925, the Collector of Etah applied for execution of the decree and prayed for sale of the property. The court ordered necessary copies to be filed. Then the vakil for the decree-holder, as the order-sheet shows, stated on the 14th of July, 1925, that he simply wanted the legal representatives of the deceased judgment-debtor to be brought on the record. Accordingly

notices were issued to the proposed representatives, one of whom was Mohammad Khalil-ur-Rahman Khan. On the 14th of August, 1925, it was found that the notices were unserved and as no further step was taken by the decree-holder, the execution suit was struck off on that date. Then another application was made on the 8th of July, 1926, for sale of the property. The execution was sought against the representatives of the deceased judgment-debtor. This time again there was a report that necessary copies were not filed and it was ordered that notices of the legal representatives being brought on the record be issued and that copies be filed on the next date. On the next date, i.e. 4th of August, 1926, the notice to Mohammad Khalil-ur-Rahman Khan was returned unserved. The decree-holder took further time and again notice was issued. On the 10th of September, 1926, the notices being served, legal representatives were brought on the record. As the decree-holder took no further steps in the prosecution of the execution suit, the application was struck off on the 16th of September, 1926.

On the 30th of August, 1928, the Collector of Etah made a third application for execution in the court of the Subordinate Judge; and the appellant, Khalil-ur-Rahman Khan, filed objections under section 47 of the Code of Civil Procedure. The learned Judge dismissed the objections by the above-mentioned order of the 22nd of April, 1929.

The learned Judge in the course of his judgment said that he found no reason to question the *bona fides* of the decree-holder in the said applications for execution and held that the object of the decree-holder in this case was not simply to save limitation, but that it was to take steps in aid of execution. He decided that the previous applications were steps in aid of execution and therefore that they saved limitation.

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The High Court affirmed this decision, holding that the finding of the learned Subordinate Judge was correct. The learned Judges however further held that in view of the ruling of the Full Bench of that Court in the case of *Kayastha Company, Ltd.* v. *Sita Ram Dube* (1), the objections raised by the judgment-debtor could not now be maintained.

In the case cited the question, stated briefly, was whether under article 182(5) of the Limitation Act (No. IX of 1908) it is sufficient to show that an application was made in accordance with law to the proper court for execution or to take some steps in aid of execution or whether it is further necessary to show that such application had been made with a *bona fide* intention to execute the decree or to take such step and not merely to keep the decree alive.

The actual question submitted to the Full Bench was as follows :—

"If a decree-holder makes any application or takes any step mentioned in the third column of article 182 of the Limitation Act, will such step be ineffectual to keep his decree alive and to save limitation, unless he can satisfy the court that he took such step or instituted such proceedings with a genuine intention of obtaining execution of the decree, if reasonably possible, and that he did not abandon such proceedings except upon a genuine belief that it would not be reasonably possible to obtain execution?"

The Full Bench decided that the answer to the question referred was in the negative.

It is not clear, therefore, whether the High Court in this case intended to confirm the Subordinate Judge's finding of fact that the decree-holder, in making the previous applications, was acting with *bona fides*, and was intending to take steps in aid of execution.

(1) (1929) I.L.R., 52 All., 11.

It is therefore necessary to consider the point raised by the learned counsel for the appellant, viz. that it is material to consider whether the first two applications were in accordance with law on the assumption that they were not *bona fide* applications for the purpose of obtaining execution of the decree, but were merely for the purpose of gaining time.

Article 182(5) prescribes the time for the execution of a decree or order of any civil court not provided for by article 183 or by section 48 of the Code of Civil Procedure, 1908, viz. three years (where the application next hereinafter mentioned has been made) from the date of applying in accordance with law to the proper court for execution or to take some step in aid of execution of the decree or order. This is the article which was applicable to the first and second applications for execution made on the 2nd of June, 1925, and 8th of July, 1926, respectively.

It should be noted that the terms of this article have been amended by Act IX of 1927, by the provision that in clause (5) of the entry in the third column, for the word "applying" the words "the final order passed on an application made" shall be substituted. But the Act did not come into force until the 1st day of January, 1928, and therefore the unamended form of article 182(5) is applicable, as already stated, to the first two applications.

In the case of *Sheo Prasad* v. *Narain Bai* (1) BOYS and BANERJI, JJ., held that in considering whether an earlier application is effective to save limitation the court may and should take into consideration whether the whole circumstances show that the application was made in good faith to secure execution or to take a step in aid of execution and was not merely colourable with a view to give a fresh starting point for the period of limitation.

(1) (1925) I.L.R., 48 All., 468.

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It was the decision in that case which gave rise to the reference to the Full Bench in *Kayastha Company, Ltd.* v. *Sita Ram Dube* (1), and it was stated in the judgment of the Full Bench that the decision in *Sheo Prasad* v. *Naraini Bai* might be supported on the special facts of that case, but that some of the general observations, which were not necessary for the decision, could not be supported. It may be noted that BANERJI, J., was a party to the Full Bench decision.

The point raised on this appeal is clearly covered by the above-mentioned Full Bench decision in the Allahabad High Court, and the question is whether any ground has been shown for disagreeing with that decision.

In their Lordships' opinion no such ground has been shown, and they agree with the decision arrived at by the Full Bench. In this case all that was necessary for the respondent to show was that the applications of the 2nd of June, 1925, and the 8th of July, 1926, were made in accordance with law to the proper court for execution, or to take some step in aid of execution, of the decree. The applications were made in accordance with the provisions of the Code of Civil Procedure, and therefore in accordance with the law applicable thereto, they were made to the proper court, they were obviously steps in aid of execution, and they were made within time.

To hold that it was necessary for the court to be satisfied that the said applications were made *bona fide* and that the decree-holder had the intention of proceeding to execution in pursuance of each of the said applications would be to import words into the terms of the article which are not to be found therein and would necessitate the court embarking upon the difficult and in some cases impossible task of finding the motive of the decree-holder in making the applications.

(1) (1929) I.L.R., 52 All., 11.

It is to be noted that by the said article, before amendment, the date of the application for execution was the time from which the period of limitation was to run, and it was not until the amending Act of 1927 was passed that the result of the application, viz. the final order passed on the application, became the material time. It was, therefore, the application and not the result of the application which was contemplated as being sufficient to save limitation.

For these reasons their Lordships are of opinion that the decision of the High Court was correct.

In view of the above opinion it is not really necessary for their Lordships to embark upon the inquiry whether the finding of the Subordinate Judge, that in fact the aforesaid applications were made *bona fide* by the decree-holder, was correct. As, however, certain arguments were presented to their Lordships in respect of this point, it is sufficient to say that their Lordships are not satisfied that the decision of the Subordinate Judge in this respect was wrong.

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *H. S. L. Polak and Co.*

Solicitor for respondent: *Solicitor, India Office.*

APPELLATE CIVIL

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Bennet

1933
August, 2

MUNICIPAL BOARD, AGRA (DEFENDANT) *v.* RAM KISHAN (PLAINTIFF)*

Municipalities Act (Local Act II of 1916), section 326—Not applicable to suits on contracts—Suit by contractor for payment for works done—Limitation.

Section 326 of the Municipalities Act is intended to apply to suits in tort in respect of wrongful acts done by a Municipal Board or by officers or servants of that Board; and a suit based on contract is not contemplated by the section. So, a suit by a contractor for payment for works done does not come under section 326 and the limitation of six months, prescribed by clause (3) of that section, does not apply to such a suit.

A Municipal Board and its officers and servants are treated on the same footing as private individuals, when they enter into a contract. No special privilege accrues to them in making contracts and the law of limitation for contract suits is the same for them as for private individuals.

Dr. *K. N. Katju* and Mr. *M. N. Kaul*, for the appellant.

Dr. *N. P. Asthana*, Messrs. *S. K. Dar* and *G. Agarwala*, for the respondent.

MUKERJI and BENNET, JJ.:—This is a first appeal from a decree of the learned Subordinate Judge of Agra awarding a sum of money to the plaintiff. Two points have been urged in appeal: firstly, that the claim was barred by limitation and secondly, that the order striking out the defence of the defendant appellant was unjust and irregular and the suit should have been tried on its merits. We shall deal with the point of limitation first. The plaint sets forth that the plaintiff is a contractor and that he carried out certain works detailed in the appendix to the plaint on behalf of the defendant the Municipal Board of Agra; that the plaintiff found

*First Appeal No. 504 of 1929, from a decree of J. N. Dikshit, Additional Subordinate Judge of Agra, dated the 21st of August, 1929.

that the Board was making delay in payments and that the plaintiff served a statutory notice on the 19th of June, 1928, informing the Board that unless the amount claimed was paid within two months, interest at 2 per cent. per mensem would be charged from the defendant; that the defendant has only paid a portion of the amount due to the plaintiff and that a sum now remains due which the defendant is liable to pay to the plaintiff for wrongfully withholding payment; that in spite of repeated letters, notices and reminders, the defendant is simply putting off the plaintiff, though the defendant has acknowledged its liability to the plaintiff; that the cause of action has been accruing to the plaintiff every month and, finally, the cause of action accrued on the 31st of March, 1929. As regards this date it may be noted that the appendix shows that this was the date of the last payment made to the plaintiff. The plaint was tendered on the 25th of May, 1929, and there was some deficiency in court fee and it was finally registered on the 1st of June, 1929.

The argument of the learned counsel for the appellant is that this suit comes under section 326 of the United Provinces Municipalities Act of 1916 and that under sub-section (3) the period of limitation is six months after the accrual of the cause of action. He points out that the appendix shows that the various works were completed by dates the latest of which is December, 1928, and that this would be more than the period of six months before the date of filing of the suit on 25th of May, 1929. Some of the works were completed in 1927. The main question before us is whether section 326 of the Municipalities Act applies or not. The point was urged before the lower court and the lower court held that that section did not apply, because the Board went on admitting their liability to the plaintiff and the cause of action was therefore a recurring one. In this Court this ground has not been urged and a broad ground is

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urged by learned counsel for the respondent that section 326 of the Municipalities Act is not intended to apply to suits on contract. That section states: "No suit shall be instituted against a Board, or against a member, officer or servant of a Board, in respect of an act done or purporting to have been done in its or his official capacity . . ." The first point taken by counsel for respondent is that the suit must be in respect of an act done by the defendant. In the present case the act is not something done by the defendant which has given rise to a cause of action, but the act is something which has been done by the plaintiff, that is, a contract under which the plaintiff has performed work. No doubt in one sense the plaintiff and the defendant both agreed to the contract, but the contract alone is not the cause of action. It is the carrying out of the contract by the plaintiff that is a principal part of the cause of action. There is not in this case a definite refusal by the defendant. Even if there had been, it is contended by the learned counsel that because the case is one of contract the acts which may be subsequently done by the defendant will not bring the case under section 326. For this proposition learned counsel referred to a ruling in *District Local Board, Poona* v. *Vishnu Raghoba* (1), in which it was held under a similar section of the Bombay Local Boards Act that the section on limitation had no application to a suit on a contract. It has also been held in a Full Bench ruling of the Bombay High Court, *Manohar Ganesh* v. *Dakor Municipality* (2), in regard to the Bombay Municipal Act II of 1884 that such suits on contract would not come under the similar section for limitation. On page 301 it stated: "Claims based on contract can never be included under this section for the simple reason that they are not claims 'for anything done or purporting to have been done in pursuance of the Act'." There was in the Municipal Act of 1873,

(1) (1932) I.L.R., 57 Bom., 67. (2) (1896) I.L.R., 22 Bom., 289.

which applied formerly to the United Provinces, then the North-Western Provinces, a similar section, section 73. A Full Bench ruling of this Court in *Birj Mohan Singh* v. *Collector of Allahabad* (1) held that this clause for limitation would not apply to a suit for declaration by certain persons that they as owners of land had a right to establish a market. It is true that in the present Municipalities Act the words "in pursuance of the Act" do not appear, and instead of that we have the words "in its or his official capacity". We do not think however that the change in the language is intended to bring under section 326 suits by a person based on contract. In our view section 326 is intended to cover wrongful acts done by a Municipal Board or by officers or servants of that Board. It was argued that an act may include an omission and that in the present case the omission to pay might be included in the term "act." That may be so, but it will not help the appellant, because the reason why we consider that this suit does not come under section 326 is that it is not a suit in tort but it is a suit in contract and we consider that a suit in contract is not one contemplated by section 326. In *Bradford Corporation* v. *Myers* (2) there was a case before the House of Lords on a similar point in regard to an English statute where the language was for all practical purposes similar. It was held by Lord HALDANE on page 251: "My Lords, in the case of such a restriction of ordinary rights I think that the words used must not have more read into them than they express or of necessity imply, and I do not think that they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority . . . In *Sharpington* v. *Fulham Guardians* (3) FARWELL, J., decided that the Act did not apply where in the

(1) (1882) I.L.R., 4 All., 339. (2) [1916] 1 A.C., 242.
(3) [1904] 2 Ch., 449.

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execution of a public duty the guardians had contracted with a builder to build for them a receiving house for the children of paupers, and the builder was suing them for breach of the particular contract they had entered into. We pointed out that although the general duty made it *intra vires* to do so, there was no duty to enter into that particular contract. He declined to hold that the mere fact that the contract was within the power of a public body to make rendered the breach anything more than a breach of the private duty to the individual builder arising out of the terms of the contract." In other words this view of law treats a municipal body and its officers and servants on the same footing as private individuals when they enter into a contract. No special privilege accrues to them in making contracts and the law of limitation for contract suits is the same for them as for private individuals. It is difficult to see what reason there could be for the law to be otherwise. Why should a Municipal Board receive any special protection when it enters into a contract? It is not a question of incapacity, and although in some senses it may be incapable it is not incapable in the legal sense. As regards acts done in performance of a statutory duty under the Municipalities Act different conditions arise and it is reasonable for the law to offer protection to municipal officers for such acts. But the making of a contract is not an act of that nature and it is not an act in performance of a statutory duty. Therefore there is no reason why the limitation period should be shortened. As a matter of practical experience it would be impossible to apply a period of six months' limitation to municipal contracts, and the history of the present suit is sufficient reason to show that point. In the present suit the correspondence between the Municipal Board and the plaintiff shows that the Board was unable to decide what were the amounts due to the plaintiff, and had consequently asked the plaintiff for time to

make inquiries of its own officers. To hold that the plaintiff would be barred by six months' limitation while such a correspondence and inquiry were going on would be to make a mere travesty of justice. We consider therefore that the period of limitation of six months in section 326 of the Municipalities Act is not intended to apply to a suit on contract and therefore it does not bar the plaint in the present case. Some Allahabad rulings were shown by learned counsel for the appellant, but we consider that those rulings are distinguishable from the present case.

The next question which arises in this appeal is the correctness of the order of the lower court in striking out the written statement. The plaintiff made three applications on the 10th of August, 1929, one for inspection, another for production of documents and a third for discovery. All these applications were in very wide terms and in our opinion the applications were not framed according to the provisions of the Code of Civil Procedure, because they should have been much more definite in mentioning the documents required. The court passed orders on the 14th of August, 1929, that the defendant should comply with these applications. The discovery was to be complied with by the 16th of August, the inspection by the 20th of August, and the documents were to be produced on the 21st of August. On the 21st of August the Municipal Board made an application to the effect that the order of the court was communicated to the vakil on the 16th or 17th instant. This is alleged by the learned Subordinate Judge to be incorrect and he says that on the 10th of August that matter was communicated. The application further pointed out that the 18th, 19th and 20th were holidays; that "all the documents asked for could not be traced and some of the documents have been brought today and efforts are being made to trace out the others, which will be shown and produced before the court as soon as

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they are available." It appears to us that this application on behalf of the defendant was very reasonable under the circumstances. But the lower court considered that the Board had not made any honest effort and the lower court ordered that the defence be struck off. We consider that this order of the lower court cannot be upheld.

Accordingly we set aside the decree of the lower court and remand the case for disposal according to law. Costs hitherto incurred will be costs in the cause.

REVISIONAL CIVIL

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Bennet

1933
August, 3

GHULAM NIZAM-UDDIN (APPLICANT) *v.* AKHTAR HUSAIN KHAN (OPPOSITE PARTY)*

District Boards Act (Local Act X of 1922), sections 18, 19, 20 *—Election petition—Decided by District Judge as election court—Revision to High Court—Powers of superintendence of High Court—Civil Procedure Code, section* 115*—Letters Patent, sections* 11, 35*—Government of India Act*, 1915, *section* 107*—Powers of local legislature—Whether section* 19 (2)(*e*) *of District Boards Act* ultra vires*—Government of India Act*, 1915 & 1919, *sections* 45A, 80A, 84*—Devolution Rules*, 1920, *schedule I, part II, paragraphs* 1, 17.

No revision lies to the High Court from the decision of a District Judge hearing an election petition under section 18 of the District Boards Act, 1922, nor is such tribunal under the powers of superintendence of the High Court under section 107 of the Government of India Act. In such cases the election court is presided over by the District Judge as a *persona designata* under section 18 of the District Boards Act, and the court is not a civil court.

Per MUKERJI, J. :—Having regard to the provisions of section 20, clauses (1) and (2) of the District Boards Act, it is clear that the District Judge, when acting as the presiding officer of an election court, is to have the powers and privileges of a civil court but not the status. The District Judge acts as a

*Civil Revision No. 512 of 1932.

persona designata and not as a civil court; therefore, no revision lies to the High Court either under the Civil Procedure Code or under section 107 of the Government of India Act, and it is unnecessary to consider the other questions raised in the case.

Per BENNET, J. :—The local legislature has power (with previous sanction) to pass laws affecting the jurisdiction and powers of the High Court, whether derived from the Government of India Act, the Letters Patent, or the Codes. The power of superintendence under section 107 of the Government of India Act depends on appellate power and can also be affected by laws of the local legislature. Section 19(2)(*e*) of the District Boards Act, 1922, is not *ultra vires* the local legislature.

Where a special tribunal is created by an Act of the local legislature or of the Indian legislature to determine rights created by that Act, and that Act states that the decision of the tribunal shall be final, there is no interference with the rights of appeal, superintendence, or revision of the High Court, because the High Court never had such rights over that tribunal. Such a tribunal is created by sections 18 to 23 of the United Provinces District Boards Act, 1922, and under these sections an election petition is not tried in the court of the District Judge, but the District Judge presides in the election court as a *persona designata*.

The Government of India Act of 1915 continued the system under which legislation affecting the jurisdiction and powers of the High Courts was to be made by the Governor-General in Legislative Council, and there was no provision for such legislation by the local legislatures. The powers of the local legislatures were extended by the Government of India Act of 1919, and the Devolution Rules of 1920, schedule I, part II, paragraph 17, so that the local legislatures may, subject to the previous sanction of the Governor-General, legislate on the constitution, powers, maintenance and organization of the High Court. It is the Devolution Rules of 1920, provided for by section 45A of the Government of India Act of 1919, which regulate the subjects on which each legislature may legislate; and the provisions in the Rules which give the local legislatures power in regard to High Courts are not repugnant to section 131(3) of the Government of India Act.

Mr. *Gopi Nath Kunzru*, for the applicant.

Mr. *Mukhtar Ahmad*, for the opposite party.

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GHULAM NIZAM-UDDIN v. AKHTAR HUSAIN KHAN

MUKERJI, J. :—This is a revision purporting to have been filed under section 115 of the Code of Civil Procedure and section 107 of the Government of India Act. It arises out of an election petition filed by the applicant, Mr. Ghualm Nizam-uddin, against the opposite party, Mr. Akhtar Husain Khan. The respondent was elected a member of the District Board of Agra and his election was challenged by the applicant. The respondent produced before the District Judge who heard the election petition a document, said to have been signed by the applicant, by which, it was alleged, he said that he had agreed for a consideration of Rs.50, which he had already received, to withdraw the case as he, the applicant, was aware of the weakness of his case. The District Judge inquired into the allegation of this adjustment of the election petition before him, and having come to the conclusion that the matter in dispute had been adjusted as alleged, he dismissed the petition.

In this Court the applicant has challenged the validity of the order on several grounds. One of these is that the District Judge should not have recorded the compromise and should have inquired into the merits of the application irrespective of the compromise. As section 19(*e*) of the District Boards Act (Local Act No. X of 1922) lays down that neither an appeal nor a revision shall lie against the decision of the election court, the applicant took the point, as one of the grounds of his revision, that this provision of the law was *ultra vires* of the United Provinces Legislative Council. On behalf of the respondent a preliminary objection has been taken that no revision is maintainable, and we have to consider, to start with, this preliminary objection, in anticipation of which the applicant's counsel took the point that section 19(*e*) of the District Boards Act, 1922, was *ultra vires* of the local legislature. Mr. *Kunzru*, the learned

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counsel for the applicant, has argued his petition very well indeed and has laid all relevant decided cases before us. His argument briefly amounts to this: The District Judge authorised by section 18 of the District Boards Act, 1922, to hear an election petition is a civil court. His decision is the decision of a civil court. The Allahabad High Court by virtue of clause 11 of its Letters Patent, is a court of appeal for all civil courts within its jurisdiction. By section 107 of the Government of India Act, 1915, the High Court has been granted superintendence over all courts subject to its appellate jurisdiction, and, therefore, over the court of the District Judge of Agra. It may be open to the local legislature to modify, by passing the District Boards Act, 1922, the Civil Procedure Code so far as it allows a right of appeal or a right of revision against the order of a District Judge, but by section 80A, sub-section (4) of the Government of India Act the local legislature has no power to make any law affecting any Act of Parliament, and therefore it has no power to interfere with the superintendence granted by the Government of India Act to the High Court over all courts within its appellate jurisdiction.

To find out if this chain of arguments is sound we have to see, as a first step, whether the election court as constituted by the District Boards Act, 1922, is a civil court. Mr. *Kunzru* has relied on several cases for the proposition that the District Judge acting under section 18 of the District Boards Act is a civil court. But we have to arrive at the right conclusion, primarily by reading the District Boards Act itself. The cases cited deal with other provisions of law and not with the District Boards Act of 1922. For, as observed in one of the cases cited by Mr. *Kunzru* himself, namely *Ramaswami Goundan* v. *Muthu Velappa Gounder* (1), the Act itself may give an indication

(1) (1922) I.L.R., 46 Mad., 536 (547).

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that the Judge who has to preside over an election court was not meant to be a civil court.

Section 15 of the District Boards Act provides that the election of any person as a member of a Board may be questioned by an election petition. Section 18 says that "An election petition shall be heard by the District Judge within whose jurisdiction the constituency concerned is situated . . . and at a place in the district within which such constituency is situated." Section 18 further provides that it is open to provide by framing a rule in this behalf that the election petition shall be heard by "some other person or tribunal". This rule has to be framed by the Local Government; see section 3, clause (9) and section 172 of the District Boards Act. Section 18 in using the words "other person or tribunal" does not give a clear indication as to whether the District Judge is a "person" or a "tribunal". Reading it as a whole, section 18 indicates that it will be open to the Local Government to appoint any person other than the District Judge or any tribunal other than the District Judge to hear an election petition.

Section 19 provides that the Code of Civil Procedure shall be followed as far as it is not inconsistent with the District Boards Act or any rule (evidently to be framed by the Local Government), subject to certain provisions mentioned in the section. One of these provisions, as already stated, is that there shall be no appeal either on a question of law or fact, and there shall be no application in revision, against or in respect of the decision of the court. The District Judge, or "some other person or tribunal" appointed by a rule framed by the Local Government, is described here as a "court". On account of the application of the Civil Procedure Code an appeal would lie from the order of the District Judge to the High Court and a revision would also be maintainable if the order of the

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District Judge be final. Evidently it is the intention of the legislature that so much of the Civil Procedure Code as allowed an appeal or a revision will not apply to an election court. Section 20 of the District Boards Act describes the officer hearing an election petition as "election court" and provides that "the election court shall have the same powers and privileges as a Judge of a civil court, and may, for the purpose of serving any notice or issuing any process or doing any other such thing, be entitled to employ, with the consent of the District Magistrate, any peon or other officer or clerk attached to the court of the District Magistrate." This provision in sub-section (1) to section 20, in my opinion, gives a clear indication of the mind of the legislature. It matters little who presides over an election court, but the person who presides will have the powers and privileges of a Judge of a civil court. This means that he is not to be a civil court but will have the powers and privileges of a civil court, though not the status. In this view the District Judge has only the powers and privileges of a Judge of a civil court, but otherwise he is not a civil court. The District Judge as the principal court of original civil jurisdiction and as a court having several other courts under his administrative control would be fully in a position to serve his orders and notices by means of the agencies under his control; but for the purposes of hearing an election petition he is to utilise the peons or other officers and clerks attached to the court of the District Magistrate. This, in my opinion, is a clear indication that though the services of a District Judge are to be utilised for the purposes of hearing an election petition, his peons and subordinate officers and clerks are not to be utilised. To use a well known phrase, he has to preside over the election court as a *persona designata* and not as a court. Sub-section (2) to section 20 makes the matter further clear. A District

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Judge's decree or order is executable either by himself or by any court subordinate to him if he sends the decree or order for execution to such courts, yet we find that the costs awarded by an election court or a security bond given for costs are to be realised and enforced not by the District Judge's court or any court subordinate to him, but by the Collector of the district and in a manner which is inconsistent with the manner of execution of a civil court decree or order, namely as if it were an order passed by the Collector in proceedings under the Agra Tenancy Act or the Oudh Rent Act.

A close scrutiny of the provisions of the District Boards Act itself leads me to the conclusion that it was never the intention of the local legislature that the District Judge's court was to be the election court, though the services of a District Judge were intended to be utilised. In this view, the District Judge hearing an election petition is not a civil court, and therefore the first chain in the argument of Mr. *Kunzru* fails.

Now I shall proceed to examine the cases cited by Mr. *Kunzru* in order to see whether there is anything in them which would suport the view put forward on behalf of the applicant that the District Judge hearing an election petition under the District Boards Act, 1922, is a civil court.

The first case to be noticed is naturally a Privy Council case cited by Mr. *Kunzru*. It is *Balakrishna Udayar* v. *Vasudeva Ayyar* (1). This case arose under section 10 of the Religious Endowments Act (XX of 1863), and one of the questions for decision was whether the word "court" in section 10 meant the District Judge himself personally (as *persona designata*) or his court. If the function imposed on the District Judge was to be done by him as a *persona*

(1) (1917) I.L.R., 40 Mad., 793.

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designata, no revision lay to the High Court and no further appeal lay to the Privy Council. Their Lordships held that the word "court" meant court and not the presiding officer. This case is not of any assistance to Mr. *Kunzru*, because the word "court" is defined in the Act itself as the principal court of original civil jurisdiction. Strictly speaking, no question of the presiding officer being a *persona designata* could have been seriously urged in the case. In the case before me it is the "District Judge" who is mentioned and not his "court". The Privy Council held that "court" meant court and not the officer personally, and I am holding that the expression "District Judge" means the "District Judge" and not his "court".

The next case to be considered is the Madras case already mentioned, namely *Ramaswami Goundan* v. *Muthu Velappa Gounder* (1). This was a decision given under Madras Local Boards Act and the rules framed thereunder, and the question to be decided was whether the District Judge, who was to hear the petition, was a *persona designata* or a court. Considering the language of the Act and the rules, the decision arrived at was that the "District Judge" was a court and not a *persona designata*. The decision that was arrived at must be taken to be based on the language before the Madras Court and cannot be applied to the case before us. The right of hearing the election petition was given to the District Judge, but no indication was given as to the procedure to be followed. It was accordingly pointed out that the procedure would be the procedure to be followed by him as a court. One of the learned Judges (KRISHNAN, J.) distinguished a Bombay case on the ground that it was decided on the language of the Act which the Bombay Court had to construe. The

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learned Judge remarks at page 547: "The Bombay Act provides that for purposes of the inquiry the District Judge may exercise any of the powers of a civil court. This may well have been held to indicate that the District Judge when making the inquiry was not a civil court himself. Each case has to be judged on its own language and I am unable to treat the Bombay case which deals with a different Act as an authority for the present case." This observation of the learned Judge affords a complete answer to Mr. *Kunzru's* argument that we ought to follow the Madras case. We have not got before us the full text of the law and rules on which the Madras Court proceeded, and therefore I do not feel bound to treat this case as an authority on the question raised before us.

The next case is that of *Palanisami Pillai* v. *Srinivasarangachariar* (1). This case contains no discussion of the point before us, and therefore need not be considered.

In the case of *In re Nanchand Shivchand* (2) the question for decision before the Bombay Court was whether the District Judge acting as the election court was a court within the meaning of the Code of Criminal Procedure and whether, therefore, any prosecution of persons who appeared before the Judge and produced documents could be instituted without the sanction of the Judge under section 195 of the Criminal Procedure Code. It was held that the District Judge was a "court", though for purposes of a civil revision he might not be a court. This ruling is of little use on the question before us, for we want to know whether the District Judge is or is not a "civil court" within the meaning of clause (11) of the Letters Patent of the Allahabad High Court. The cases considered by the Bombay Court would indicate that in Bombay a District Judge exercising function as an election court under the Municipalities

(1) (1924) 47 M.L.J., 795. (2) (1912) I.L.R., 37 Bom., 365.

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Act is not treated as a civil court, and no revision is allowed against his orders under the Civil Procedure Code.

The next case that I feel inclined to consider is the case of *H. D. Chatterjee* v. *L. B. Tribedi* (1). There the question was whether an order passed by a "Rent Controller" was passed by him as a civil court and whether, therefore, the High Court could revise his orders under section 107 of the Government of India Act. It was held that he was. The reasons for the decision will be found at page 534 of the report and do not throw much light on the language of the Act which I have to construe. The reason given for the decision was that rule 24 of the rules framed by the Local Government and section 23 of the Calcutta Rent Act (by which the Rent Controller's office was created) laid down that in all proceedings before them the Controller and the President of the Tribunal should have all the powers possessed by a civil court for trial of suits, with this modification that only the substance of the evidence need be recorded. On this provision and on this provision alone it was held that the Rent Controller was a court of civil jurisdiction. I am afraid this case does not throw much light on the point before us.

Against Mr. *Kunzru's* contention the Full Bench decision of this Court in *Abdur Rahman* v. *Abdur Rahman* (2) was cited. The questions to be decided there were not whether the election court under the Municipalities Act (the Commissioner) was a civil court but two other questions stated at page 526 of the report. The points argued were that the United Provinces local legislature could not appoint any court or tribunal or the Commissioner for trying election cases and that the Local Government could not take away the right of appeal or revision to and by this

(1) (1921) I.L.R., 49 Cal., 528. (2) (1925) I.L.R., 47 All., 513.

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Court against the decision of the Commissioner. At page 529 no doubt the following observations occur: "It may be added that the appellant's argument breaks down at the outset, unless the term "civil courts" used in the Letters Patent can be held to include such a court as that created by section 22 of the United Provinces Municipalities Act. It is not strictly necessary to decide the point, but in the opinion of the majority of us these words were never intended to cover a tribunal created under a particular statute for a particular purpose." I do not consider that this observation can be treated as any decision at all on the point before us, and if I were inclined to accept Mr. *Kunzru's* arguments, this observation would not have stood in my way. I may, however, point out that the language of the Municipalities Act, so far as the creation of an election tribunal goes, is very similar to the language of the District Boards Act of 1922. There is, however, an important difference, inasmuch as under the Municipalities Act the Commissioner was created the election tribunal, while under the District Boards Act it is the District Judge. In the case of a Commissioner it will be difficult to argue that his court was a court of civil jurisdiction, but in the case of a District Judge the use of the very name would lend some support to the view that his court was a civil court.

I hold that the election court whose decision is being sought to be impeached by the applicant is not a civil court, and, therefore, it is not under the superintendence of the High Court under section 107 of the Government of India Act. In view of this decision it is not necessary to consider the other links in the chain of Mr. *Kunzru's* arguments.

I would dismiss the revision as incompetent and with costs.

BENNET, J.:—This is an application for revision of an order dismissing an election petition brought under

section 15 of the United Provinces District Boards Act, 1922. A preliminary objection is taken that no revision lies. Section 19(2)(*e*) of that Act states: "There shall be no appeal either on a question of law or fact, and no application in revision against or in respect of the decision of the court." The reply in ground 6 of the grounds of revision is "That section 19(*e*) is *ultra vires* of the U. P. Legislative Council." The first matter is to examine the powers of the U. P. Legislative Council. Under the Government of India Act, 1833, legislation was vested in the Governor-General of India in Council. This system of legislating from a central source exclusively, continued in force until the passing of the Indian Councils Act, 1861, which established local legislatures for the provinces of Madras and Bombay, and gave power to the Governor-General in Council to extend the provisions of the Act to Bengal and to establish similar local legislatures in other provinces. A local legislature was first established in the North-Western Provinces under this Act. Section 42 laid down that local legislatures could "make laws and regulations for the peace and good government of such presidency, and for that purpose to repeal and amend any laws and regulations made prior to the coming into operation of this Act by any authority in India, so far as they affect such presidency: Provided always, that such Governor in Council shall not have the power of making any laws or regulations which shall in any way affect any of the provisions of this Act, or of any other Act of Parliament in force, or hereafter to be in force, in such presidency." Section 48 extended these provisions to future Councils of Lieutenant-Governors. Section 43 contained a list of subjects on which the local legislature might only legislate with the previous sanction of the Governor-General.

We now come to the Government of India Act of 1915. The powers of local legislatures are given in

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section 79. There is the power to make laws for the peace and good government, the need for previous sanction for laws altering any law made by another authority in India, or for laws dealing with certain subjects, and sub-section (4) which provides: "The local legislature of any province has not power to make any law affecting any Act of Parliament."

This Act provided in section 106 for the powers and jurisdiction of High Courts. In section 107 it is provided: "Each of the High Courts has superintendence over all the courts for the time being subject to its appellate jurisdiction" and may call for returns, transfer suits or appeals, make rules, prescribe forms and fees. Section 108 empowers High Courts to make rules for Bench and single Judge jurisdiction. Section 109 empowers the Governor-General in Council to alter local limits of jurisdiction of High Courts. Section 110 exempts the Governor-General and Governors and their executive councillors from the jurisdiction of High Courts. Section 111 refers to justification by written orders of the Governor-General. Section 112 provides the law to be administered by High Courts of original jurisdiction. Section 131(3) provides: "Nothing in this Act shall affect the power of the Governor-General in Legislative Council to repeal or alter any of the provisions mentioned in the fifth schedule to this Act, or the validity of any previous exercise of this power." In the fifth schedule are mentioned "section 106—jurisdiction, powers and authority of High Courts; 108(1)—exercise of jurisdiction of High Court by single Judges or division courts"; also sections 109, 110, 111 and 112. It is to be noted that section 107 is omitted from the fifth schedule. The argument has been advanced that the omission is made because it was intended that the Governor-General in Legislative Council should not have power to affect the revisional jurisdiction of the High Courts. This argument

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appears incorrect. There is no reason why such an exception should be made. It appears that section 107 is omitted because it refers to "all courts for the time being subject to its appellate jurisdiction" and the appellate jurisdiction is provided for in section 106. A measure affecting the appellate jurisdiction in section 106 will affect the power of superintendence in section 107, and thus there was no need to include section 107 in the fifth schedule. A reference to the Act for establishing High Courts, 1861, shows that section 107 corresponds, with only verbal changes, to section 15 of the Act of 1861. Section 106 corresponds to section 9,—jurisdiction and powers of High Courts. Section 9 states that the powers of the High Courts are "subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council."

The system therefore was continued by the Government of India Act of 1915 that legislation affecting the jurisdiction and powers of the High Courts was to be made by the Governor-General in Legislative Council, and there was no provision for the legislation by the local legislatures.

The provisions of the Government of India Act of 1915 have been set out, because it was under that Act that the United Provinces Legislative Council passed the United Provinces Municipalities Act, Act II of 1916, which contains in sections 19 to 27 provisions for an election tribunal which are almost the same as the provisions in the United Provinces District Boards Act, 1922, sections 16 to 23. The validity of these provisions in the Municipal Act of 1916 has been considered by a Full Bench of this High Court in *Abdur Rahman* v. *Abdur Rahman* (1), and it was held that the local legislature had power to pass this Act. On page 526 the second point set out shows that revisional

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jurisdiction was also considered. This ruling will be discussed in more detail later, but at present it is cited to show that it referred to the Government of India Act of 1915, where the powers of the local legislature were not so extensive as at present. These powers have been extended by the Government of India Act of 1919. That Act is a consolidating Act and it omits section 79, but its provisions are found in section 80A with some additions. The prohibition against making any law affecting an Act of Parliament remains, and section 84 has added to it a paragraph stating: "A law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy, but not otherwise, be void." A new section is added, 45A, which states: "(1) Provision may be made by rules under this Act (*a*) for the classification of subjects, in relation to the functions of government, as central and provincial subjects, for the purpose of distinguishing the functions of Local Governments and local legislatures from the functions of the Governor-General in Council and the Indian legislature." Sub-section (4) states: "The expressions 'central subjects' and 'provincial subjects' as used in this Act mean subjects so classified under the rules." By section 129A (1) the rules are to be made by the Governor-General in Council, with the sanction of the Secretary of State, and shall not be subject to alteration by the legislatures in India. Under sub-section (3) the rules are to be laid before each House of Parliament for sanction. Under section 45A the Devolution Rules were published on the 16th of December, 1920. Schedule I, Part I—Central Subjects, contains: "16. Civil law, including laws regarding status, property, civil rights and liabilities, and civil procedure; 30. Criminal law, including criminal procedure; 41. Legislation in regard to any provincial subject, in so far as such subject is in Part II

of this schedule stated to be subject to legislation by the Indian legislature, and any powers relating to such subject reserved by legislation to the Governor-General in Council." Schedule I, Part II—Provincial subjects, contains: " 1. Local self-government, that is to say, matters relating to the constitution and powers of Municipal corporations, improvement trusts, district boards . . . subject to legislation by the Indian legislature as regards (*a*) the powers of such authorities to borrow otherwise than from a provincial government, and (*b*) the levying by such authorities of taxation not included in schedule II to the Scheduled Taxes Rules."

There is no provision for the constitution and powers of election tribunals to be subject to legislation by the Indian legislature. Nor is there any exclusion of such a subject, though an exclusion is specified on another matter;—"exclusive of matters arising under the Cantonments Act, 1910". The important provision is contained in paragraph 17: "17. Administration of justice, including constitution, powers, maintenance and organisation of courts of civil and criminal jurisdiction within the province; subject to legislation by the Indian legislature as regards High Courts, Chief Courts, and Courts of Judicial Commissioners, and any courts of criminal jurisdiction." What is the meaning of the expression "subject to legislation by the Indian legislature"? It does not mean that such subjects are excluded from legislation by the local legislature. The exclusion of subjects is provided for by the use of the word "excluded". For example, in Part II—Provincial subjects, it is provided in paragraph 5: "5. Education: provided that (*a*) the following subjects shall be excluded, namely (i) the Benares Hindu University, etc." The meaning of the expression is given in paragraph 41 of Part I, quoted above, and

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that paragraph makes it possible for the Indian legislature to legislate on a provincial subject where these words are used. It does not take away the power of the local legislature to legislate on the same subject. The result is that both legislatures have a concurrent power of legislation on such subjects. To keep the legislation in harmony the provision is made in section 80A as follows: "(3) The local legislature of any province may not, without the previous sanction of the Governor-General, make or take into consideration any law . . . (*f*) regulating any provincial subject which has been declared by rules under this Act to be, either in whole or in part, subject to legislation by the Indian legislature, in respect of any matter to which such declaration applies." The result is that subject to the previous sanction the local legislature may legislate on the "constitution, powers, maintenance and organisation" of the High Court and Chief Court.

That the local legislature has exercised such powers is shown by the Oudh Courts Act, United Provinces Act IV of 1925, which states in the preamble that the Governor-General has given his previous sanction required by section 80A, sub-section (3) of the Government of India Act. Section 3 states:; "On and from the commencement of this Act there shall be established for Oudh a Chief Court, hereinafter referred to as the Chief Court." The local legislature, acting under paragraph 17 of Part II of Schedule I of the Devolution Rules, obtained previous sanction and passed this Act setting up a Chief Court. The rule refers to the High Courts and Chief Courts in precisely the same terms. The appellant's learned counsel, Mr. *Kunzru*, in an elaborate address referred to many rulings, and he argued that local legislatures could not pass laws affecting the powers of High Courts. None of these rulings referred to paragraph 17 of Part II of Schedule I of the Devolution Rules, under which this

power has been given in 1920 to local legislatures. If the argument of Mr. *Kunzru* were correct, it would apparently follow that since 1925 the Oudh Chief Court has been functioning without jurisdiction.

Mr. *Kunzru* laid stress in his address on the provisions in the Government of India Act, 1919, for legislation by the Indian legislature in regard to High Courts,—section 131(3) and the fifth schedule. He argued that as the Act did not provide for legislation on this subject by local legislatures, therefore such legislation was repugnant to the Act, and therefore void under section 84. This argument ignores the Rules under the Act. The error arises from the fact that the Government of India Act, 1919, is a consolidating Act, as stated in the title: "An Act to consolidate enactments relating to the Government of India." In the Government of India Act of 1915 there was an attempt made to deal in the Act itself with the question of what matters should form the subject of legislation by the central legislature and local legislatures respectively. Accordingly, for the central legislature there was a list of subjects in section 65, and the provision of the fifth schedule and section 131(3); for the local legislatures there was a list in section 79. These provisions have been retained in the Government of India Act, 1919, section 79 now forming part of section 80A. But it was found that a much more elaborate division must be made between the central and local legislatures than could be effected in the Act itself. Consequently there was added to the Act section 45A providing for rules to classify subjects into central and provincial, and corresponding limitations were imposed in section 67(2)(*i*) and (*ii*) for the central legislature, and section 80A (3) (*e*), (*f*), and (*g*) for the local legislatures. It is to these rules that we must look for the subjects on which each legislature may legislate. And there is provision in the rules under which local legislatures

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may with previous sanction pass laws affecting the jurisdiction and powers of High Courts. These provisions are not inconsistent with the sections of the Act; they are supplemental to the sections. Section 131(3) does not give the Governor-General in Council exclusive power to alter the provisions of the Act in the fifth schedule; it does give him this power, but not exclusively. So the provisions in the rules which give the local legislatures similar power in regard to High Courts are not repugnant to section 131(3).

The argument now took a different shape. It was admitted that if local legislatures could affect laws passed by the Indian legislature, then the revisional jurisdiction of the High Court under section 115 of the Code of Civil Procedure might be taken away. But it was said that the High Court has revisional jurisdiction under its Letters Patent, and also under section 107, Government of India Act.

As regards the Letters Patent it was argued that section 11 provided "that the said High Court of Judicature at Allahabad shall be a court of appeal from the civil courts of the said territories and from all other courts to which there is now an appeal to the Sudder Dewanny Adawlut", and that section 35 stated: "And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section 71 of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section 72 of that Act and may be in all respects amended and altered thereby." It was argued that as section 35 does refer to the Government of India Act but does not provide that the Letters Patent are subject to legislation by the local legislature, therefore the Letters Patent are not so subject. But the Government of India Act to which reference is made is

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that of 1915, not that of 1919. There has only been one Letters Patent issued after the Government of India Act, 1919, and the Devolution Rules of 1920. That is the Letters Patent of the High Court of Rangoon, and section 47 says: "And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the local legislature and of the Indian legislature" etc. It is therefore clearly the intention that the powers and jurisdiction of High Courts should be subject to the legislative powers of the local legislature, and it cannot be intended that there should be an exception only in the case of Rangoon and that other High Courts should not be so subject. The provision for Rangoon is a recognition by the Crown of the effect of the Devolution Rules.

Learned counsel for the applicant relied chiefly on section 107, Government of India Act. One of his arguments was that this was a section of an Act of Parliament, and any law made by any authority in British India repugnant to it would be void to the extent of that repugnancy under section 84. He argued that the local legislature had no power under the Act to legislate in regard to the High Court, and that the Indian legislature had no power to legislate in regard to section 107 because that section is not entered in the fifth schedule as a section which the Indian legislature is empowered by the Act to alter. Learned counsel relied strongly on a recent ruling of a Special Bench of the Bombay High Court in *Balkrishna Hari Phansalkar* v. *Emperor* (1). This was an application for criminal revision against convictions by a Sub-divisional and Special Magistrate of offences under section 21 of Ordinance II of 1932. This Ordinance was made by the Governor-General under section 72 of the Government of India Act which says: "but the power of making Ordinances under this section is subject to

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the like restrictions as the power of the Indian legislature to make laws." Section 51 of the Ordinance stated: "there shall, save as provided by this Ordinance, be no appeal from any order or sentence of a court constituted under this Ordinance, and, save as aforesaid, no court shall have authority to revise such order or sentence" etc. On page 110, BEAUMONT, C. J., states: "I have no doubt, therefore, that the section does take away the powers of the High Court derived under the Code of Criminal Procedure, and under the Letters Patent. But, as I have said, it was not competent for the Ordinance to take away the powers derived under section 107 of the Government of India Act. Now, what are those powers? Under section 107 the High Court has superintendence over all courts for the time being subject to its appellate jurisdiction. It is not disputed that rights of superintendence include not only superintendence on administrative points, but superintendence on the judicial side too, and that under its power of superintendence the High Court can correct any error in a judgment of a court subject to its appellate jurisdiction. It seems to me clear that the Special Courts under the Ordinance are courts subject to the appellate jurisdiction of the High Court, because under section 39 the High Court has power to hear appeals in certain cases." On page 109 he stated: "but the powers conferred on the High Court by section 107 of the Government of India Act, which is an Act of the Imperial Parliament, cannot be controlled by the Governor-General. That, in my judgment, is the effect of section 65 of the Act and of the fifth schedule."

Now, the learned CHIEF JUSTICE and his colleagues did not anywhere refer to the powers of legislation given under the Devolution Rules of 1920 to the Indian legislature. The ruling, therefore, is no authority on the interpretation of those portions of the rules which

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have been quoted. Apparently these rules were not brought to the notice of the Court and the Court proceeded on the assumption that the only powers of legislation were those quoted from section 65 of the Act and the fifth schedule, both of which provisions date from the earlier Government of India Act of 1915, and not from the later Act of 1919 which gave wider powers in accordance with the Montagu-Chelmsford reforms. Presumably the powers of the Governor-General to make Ordinances under section 72 were also widened, as the restrictions for those powers are stated in section 72 to be the same as the restrictions for the Indian legislature. Owing to this important omission the ruling is not an authority for the doctrine of *ultra vires* in the present case. But in one respect it is useful, as it lays down that section 107 applies because in the Ordinance the High Court has power to hear appeals in certain cases.

This brings up the consideration of the court which heard the election petition in the present case. The United Provinces District Boards Act, 1922, provides, in section 18:

"18. (1) An election petition shall be heard by the District Judge within whose jurisdiction the constituency concerned is situated (unless some other person or tribunal has been appointed by rule in this behalf) and at a place in the district within which such constituency is situated.

"(2) An election petition, and any application relating to the hearing of an election petition, may be presented to such District Judge, or to such other person or tribunal, or to a Munsif within whose jurisdiction the constituency concerned or any part thereof is situated."

Section 19 applies the Civil Procedure Code in regard to suits except so far as it is inconsistent with the Act or any rule. Certain provisos follow, including the one excluding appeals and revisions.

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Section 20 states: "20. (1) Unless it is otherwise provided by rule made in this behalf, the election court shall have the same powers and privileges as a Judge of a civil court and may, for the purpose of serving any notice or issuing any process or doing any other such thing, be entitled to employ, with the consent of the District Magistrate, any peon or other officer or clerk attached to the court of the District Magistrate.

"(2) An order for costs, or an order for the realisation of a security bond for costs, passed by the election court, may be sent by that court for execution to the Collector of the district within which the constituency concerned is situated, and an order so sent shall be executed by the Collector in the same manner as if it were an order passed by the Collector in proceedings under the Agra Tenancy Act, 1901, or the Oudh Rent Act, 1886, as the case may be".

To show that the High Court has superintendence over the election court under section 107 of the Government of India Act, it must be shown that the election court is a "court for the time being subject to its appellate jurisdiction." The petition in the present case was heard by the District Judge, as there are no rules for another person or tribunal under section 18.

Learned counsel argued that the District Judge is a civil court under the Bengal, Agra and Assam Civil Courts Act, 1887, having cognizance of all original suits for the time being cognizable by civil courts, under section 18. Section 20(1) states: "Save as otherwise provided by any enactment for the time being in force, an appeal from a decree or order of a District Judge or Additional Judge shall lie to the High Court." Therefore he argues that section 107 would apply.

The question is whether the District Judge is acting as a *persona designata* under section 18 of the District Boards Act or whether the election petition is being heard in the civil court of the District Judge. If the

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latter were the case, the Act would contain some provision for the District Judge to use his own peons, officers and clerks instead of those of the District Magistrate, or to realise costs through the civil courts instead of through the Collector. It was argued that these provisions are only inserted in case rules provide for another person or tribunal. But section 18 contemplates the District Judge as the person to hear the election petition in the absence of such provision, and the omission to provide for the use of the machinery of the district courts is remarkable.

Then there is the provision that the election court shall have the same powers and privileges as a Judge of the civil court. If the District Judge were not acting as a *persona designata*, the provision in section 20(1) would naturally run as follows,—" the election court, when not the court of the District Judge, shall have the same powers and privileges as a civil court". The omission of these words shows that the District Judge is merely acting as a *persona designata* and not as District Judge, and so it is necessary to give him also the powers and privileges of a civil court when hearing an election petition. It was argued that these words were merely put in for other persons. But they are also applied by section 20 to the District Judge.

Mr. *Kunzru* referred to *Ramaswami Goundan* v. *Muthu Velappa Gounder* (1), where it was held that a District Judge trying an election petition under the Madras Local Boards Act, XIV of 1920, was not a *persona designata* but was acting as the district court. The wording of the Act was examined and KRISHNAN, J., on page 543 points out that "Rule 4, clause (3) expressly says that in certain cases the Judge may direct any *court* subordinate to him to hold the inquiry. A District Judge or Subordinate Judge has no court subordinate to him when acting as a *persona designata* but only

(1) (1922) I.L.R., 46 Mad., 536.

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when acting as the district court or the subordinate court." There is no provision in the District Boards Act, 1922, which gives an indication of this nature. Mr. *Kunzru* did not produce the Madras Municipal Act or Local Boards Act, but from a perusal of numerous Madras rulings cited by him it appears that these Acts contain no provision that the decision of the trying court was to be final, and they provide for trial by the ordinary civil courts. These decisions have therefore no bearing on the interpretation of the United Provinces District Boards Act, 1922, which has quite different provisions. In another case, *Deivanayagam Pillai* v. *Diwan Mohideen Rowther* (1), another learned Judge held that the High Court had no power to revise an order of a Subordinate Judge when he was trying an election petition under the Madras Municipalities Act, as he was not a civil court. Reference was also made to *Bhaishankar Nanabhai* v. *Municipal Corporation of Bombay* (2). On page 609 Sir LAWRENCE JENKINS, C. J., stated :—

"But where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive.

"It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary courts, for they never had any; there is no change of the old order of things; a new order is brought into being.

"Here not only is the Chief Judge appointed the tribunal, but it also is expressly provided that his order shall be conclusive, and that every election not called in

(1) (1922) 44 M.L.J., 39.

(2) (1907) I.L.R., 31 Bom., 604.

question in accordance with the provisions of section 33 shall be deemed to have been to all intents and purposes a good and valid election.

"But then it is argued that this is a suit of a civil nature, and section 11 of the Civil Procedure Code provides that the courts shall have jurisdiction to try all suits of a civil nature. But from this rule are excepted 'suits of which their cognizance is barred by any enactment'. The jurisdiction of the courts can be excluded, not only by express words, but also by implication, and there certainly is enough in section 33 of the Municipal Act for this purpose; for there is no right which the plaintiff can at this stage assert as the subject of this suit, which is not subject to the condition that its essential basis must depend on the decision of the tribunal created for the purpose." The Court therefore held that a suit would not lie on the original side of the Bombay High Court to declare that an election under the Municipal Act was invalid. It held that although the Chief Judge of the small cause court was to inquire into the validity of an election under the provisions of the Act, that did not make the suit a civil suit and the civil courts had no jurisdiction in regard to the suit. This case is an answer to the argument for applicant that because the District Judge hears the election petition therefore the case must be a civil suit and he must be acting as a civil court.

Reference was made to *Sheonandan Prasad Singh* v. *King-Emperor* (1), where it was held that the High Court has no jurisdiction to superintend the proceedings of Commissioners appointed under the Defence of India Act, 1915. This case came under the provisions of the Indian Councils Act, 1861, and the power of superintendence in section 15 of the Indian High Courts Act of 1861, which section is similar to section 107 of the present Government of India Act, 1915.

(1) (1918) 3 Pat. L.J., 581.

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The learned CHIEF JUSTICE said on page 590: "It was argued on behalf of the petitioner that the powers of superintendence conferred by section 15 could not be taken away by an Act of the Indian legislature, such powers being conferred by an Act passed in the same session of Parliament as the Indian Councils Act and consequently, by reason of the proviso in section 22 of that Act, placed beyond the control of the Governor-General in Council. The Defence of India Act, however, does not purport to take away any existing powers of superintendence but merely to create a new court which shall be independent of the High Court. The superintendence conferred on the High Courts by section 15 was confined to superintendence over those courts which are subject to the appellate jurisdiction of the High Court, whereas the tribunal over which superintendence is now asked for was by the very Act which created it subject to no appellate jurisdiction whatever."

The Allahabad High Court had given one Full Bench ruling on the subject in *Abdur Rahman* v. *Abdur Rahman* (1). That was an election case under the United Provinces Municipalities Act, Act II of 1916. The provisions of this Act, sections 19 to 27, are word for word the same as those of the District Boards Act of 1922, sections 16 to 23, with two exceptions. One difference is that the officer mentioned as the person to try the petition, if no other person or tribunal is appointed by rule, is the Commissioner of the division, instead of the District Judge. The other difference is that section 23(2)(*e*) allows a reference on a point of law by the court to the High Court, and there is no such provision in the District Boards Act. Learned counsel argued that the decisions in this Full Bench case should not govern the present case because of this difference between the Commissioner and the District

(1) (1925) I.L.R., 47 All., 513.

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Judge. But if election courts were civil courts, the occupation of the presiding officer when he was not presiding in the election court would not make any difference. On the other hand if election courts are not civil courts, but are special courts created by statute, then the fact that a presiding officer of a civil court is appointed to preside over an election court will not make the election court a civil court. The ruling therefore does apply to the present case. In the ruling the Commissioner had set aside an election, and the person whose election was set aside filed an appeal in the High Court. He also filed a suit in the court of the Subordinate Judge for a declaration that the proceedings of the Commissioner were null and void and that the provisions in the Municipalities Act were *ultra vires* of the local legislature. On page 526 the grounds of appeal were set out :—

"1. That it is *ultra vires* of the United Provinces local legislature to appoint any court or tribunal for the trial or the exclusive trial of election cases or to appoint the Commissioner as the election tribunal.

"2. That, at any rate, it is *ultra vires* of the United Provinces local legislature to take away or restrict in any manner the powers of appeal or revision of this Court and to make the decision of the Commissioner final."

On the first point it was held on page 527, under the Government of India Act of 1915 which applied as the United Provinces Municipalities Act was of 1916 : "If a wide general power to legislate for the peace and good government of the province does not include a power to devise means for deciding on the validity of a disputed election to a seat on a Municipal Board, it is difficult to know what it does include." Again, "The local legislature has, in a number of instances, both under the Indian Councils Act of 1861 and under the

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Government of India Act, created tribunals for particular purposes or excluded the jurisdiction of the civil courts in particular cases. The enactments containing these provisions have repeatedly come before the courts, and it has never hitherto been suggested that there was any doubt as to their validity." On page 529 it was stated: "It may be added that the appellant's argument breaks down at the outset unless the term 'civil courts' used in the Letters Patent can be held to include such a court as that created by section 22 of the United Provinces Municipalities Act. It is not strictly necessary to decide the point, but in the opinion of the majority of us these words were never intended to cover a tribunal created under a particular statute for a particular purpose. There is equally little foundation for the contention that the Commissioner sitting as an election court is subject to the superintendence of this Court. The power of superintendence rests on section 107 of the Government of India Act, which extended it to all courts subject to the High Court's appellate jurisdiction. There is no other provision of law to which appeal can be made as conferring a power of superintendence in this case. It is very difficult to argue that the election court is under the appellate jurisdiction of the High Court when the Act which creates it expressly declares that there shall be no appeal from any of its decisions." On page 532 it is stated: "The ordinary rule is that where the statute which creates the right also prescribes a specific remedy, the person aggrieved is limited to the remedy so prescribed." The Court found against the appellant on all points, that there was no right of appeal, revision, or suit. Since that decision the law against the applicant has become clearer, as the present District Boards Act of 1922 was passed after the Government of India Act of 1919 and the Devolution Rules of 1920, which state clearly the power of the local legislature to pass laws affecting the jurisdiction and powers of High Courts.

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In *Bhagwat Das* v. *Chhedi Koeri* (1) it was held that no revision lay from an order of the District Judge sitting as a revenue court in a second appeal from the appellate order of the Collector. The procedure was under the Agra Tenancy Act, Act II of 1901, in a suit for arrears of rent. On page 538 it was held: "It is clear that for a long series of years this Court has interpreted section 167 in a sense which is fatal to the case put forward here by the applicants. It has been held that under the terms of section 167 the powers of the High Court to interfere in revision have been ousted. The decisions on this subject cover a period roughly from 1909 to 1925." Under section 182 of Act II of 1901 a second appeal lay to the High Court from the appellate decree of a District Judge. Mr. *Kunzru's* argument is that where appeals for some purposes lie, then there is a power of superintendence (or revision) under section 107, Government of India Act, and the previous section 15 of the High Courts Act, 1861. He also argues that restrictions on the revisional powers of the High Court in an Act of the local legislature are void. If these arguments were correct, then the long series of decisions of this High Court from 1909 to 1925 are wrong, and both counsel and court missed these points. These arguments have not been accepted in any decision of this Court. It is argued that there are some decisions of the Calcutta and Madras High Courts in which the arguments have been partly accepted. One such case is *Adhar Kumar* v. *Radha Madan* (2). In that case the President of the Calcutta Improvement Tribunal purported to act as a court under section 32, Land Acquisition Act, and ordered some funds to be used in the purchase of lands. No appeal lay, but the High Court interfered in revision. The High Court held that revisional power lay under section 115 of the Code of Civil Procedure as well as

(1) (1926) 24 A.L.J., 537. (2) A.I.R.1932 Cal., 660.

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under section 107, Government of India Act, and there is no reference to any bar of revision by the Local Act. The ruling therefore does not support the arguments. A similar reason makes the ruling in *Gokul Chandra Lana* v. *Nistarini Ghosh* (1) inapplicable. In *Piyot* v. *Ali Mahammad Mandal* (2) it was held that the High Court had power under section 107 of the Government of India Act to set aside proceedings by a Magistrate under section 145 of the Code of Criminal Procedure which were instituted without jurisdiction. At the time of this ruling in 1920 section 435 of the Code of Criminal Procedure, which deals with the power under the Code of revision, stated that "Orders made . . . and proceedings under chapter XII . . . are not proceedings within the meaning of this section." The effect of this provision merely was that there was no power of revision given by the Code. But there was no provision in the Code that no revision should lie. The decision therefore does not support the argument for the applicant. The ruling is similar to *In the matter of the petition of Nathu Mal* (3). In *H. D. Chatterjee* v. *L. B. Tribedi* (4) it was held that the Rent Controller under the Calcutta Rent Act of 1920 was a court of civil jurisdiction, because he has the power of a civil court and follows the procedure of a civil court, and therefore his order could be revised by the High Court under section 107, Government of India Act. As it is not stated that there was any provision in the Calcutta Rent Act against revision the case does not support the argument. It is not necessary to refer to other cases cited.

From the considerations set forth the conclusion follows that the following propositions of law are established :—

(1) The local legislature has power (with previous sanction) to pass laws affecting the jurisdiction and

(1) (1930) I.L.R., 58 Cal., 1013.
(2) (1920) I.L.R., 48 Cal., 522.
(3) (1902) I.L.R., 24 All., 315.
(4) (1921) I.L.R., 49 Cal., 528.

powers of the High Court, whether derived from the Government of India Act, 1919, the Letters Patent, or the Codes.

(2) The power of superintendence under section 107, Government of India Act, 1919, depends on appellate power and can also be affected by laws of the local legislature.

(3) Where a special tribunal is created by an Act of the local legislature or of the Indian legislature to determine rights created by that Act, and that Act states that the decision of the tribunal shall be final, there is no interference with the rights of appeal, superintendence, or revision of the High Court because the High Court never had such rights over that tribunal.

(4) Such a tribunal is created by sections 18 to 23 of the United Provinces District Boards Act, 1922, and under these sections an election petition is not tried in the court of the District Judge, but the District Judge presides in the election court as a *persona designata*.

Accordingly I consider that no application in revision will lie in the present case, and I would dismiss the application with costs.

BY THE COURT :—The petition for revision is dismissed with costs.

APPELLATE CRIMINAL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Young

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August, 3

EMPEROR *v.* JHABWALA AND OTHERS*

Indian Penal Code, section 121A—Communist conspiracy to deprive the Queen of her sovereignty of British India—"The Queen", meaning of—General Clauses Act (X of 1897), section 3(23)—Conspiracy, evidence and proof of—Evidence Act (I of 1872), section 10—Criminal Procedure Code, sections 208, 210, 347—Power to commit without hearing whole of the prosecution evidence—Written statement by accused at sessions trial—Criminal Procedure Code, sections 256(2), 342—Examination of accused not to be lengthy cross-examination—Criminal Procedure Code, section 367—Judgment need not contain a résumé of the entire evidence—Criminal trial—Unnecessary multiplication of evidence—Sentence, considerations in adjudging—Evidence Act (I of 1872), section 45—Expert evidence as to identity of typewriter used for several documents—Evidence Act (I of 1872), section 11—Printed newspaper as evidence of the facts stated therein.

In a trial under section 121A of the Indian Penal Code the accused persons were classifiable into four groups,—(1) members of the Communist Party of India; (2) members of the Communist Party of Great Britain; (3) professed Communists, but not members of any Communist Party; and (4) non-communists, who had been taking an active part and interest in Trade Union movements and in Workers and Peasants' Parties. It was *held* that (1) The members of the first group, who subscribed to and adopted the programme of the Communist International of Soviet Russia, had undoubtedly formed a revolutionary body with the professed object of overthrowing the present order of society and bringing about the complete independence of India by means of armed uprisings of the proletariat including the workers and peasants. This objective of theirs was not merely a distant aim to be realised in the unknown far off future, but was an immediate object, to be looked out for and realised whenever conditions became favourable, for which the preliminary spade

*Criminal Appeal No. 122 of 1933, from an order of R. L. Yorke, Additional Sessions Judge of Meerut, dated the 16th of January, 1933.

work was to be carried on in the mean time. These persons were therefore guilty of having conspired to deprive His Majesty the King of his sovereignty of British India. (2) The members of the second group belonged to the Communist Party of Great Britain, which was a section of the Communist International, and had adopted the full programme of the latter. They were sent out to India for the express purpose of carrying out that programme, and in close association with the first group took part in various activities which were part of the programme. They were, therefore, equally guilty. (3) Regarding the third group consisting of professed communists who, however, were not members of any Communist Party, no doubt the mere holding of communist beliefs or doctrines was not punishable *per se*; a theoretical communist or a student of communism could not be said to be guilty of an offence. And if a communist were to work individually, in furtherance of his belief, he would not be guilty of conspiracy. Those persons in the third group, whose conduct and whose acts established in point of fact that they had conspired with the members of the Communist Party to carry out the same doctrines, were guilty under section 121A. (4) The persons in the fourth group not only did not belong to any party committed by its constitution to adopting the programme of the Communist International, but were not even communists, believing in its doctrine of the inevitable use of force; they could not be presumed to have entered into a conspiracy with the communist accused for depriving His Majesty the King of his sovereignty of British India merely if they had taken part in Trade Union activities or had made seditious speeches. Although it is a part of the communist programme to form communist fractions who enter into other non-communist organisations like Workers and Peasants' Parties, Trade Unions etc., and try to influence the members and help in the dissemination of communist ideas, yet as such bodies are open to non-communists and there is nothing in their constitutions to show that they are communist organisations, the mere fact of the association of non-communists with communists in these organisations would not, without cogent evidence, justify an inference that they had all conspired together for the purpose of depriving His Majesty of his sovereignty of British India. In the case of such accused persons something more than taking part in such organisations or making seditious speeches would be required to prove the case of conspiracy beyond doubt.

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Section 121A of the Indian Penal Code obviously draws a distinction between the Sovereign for the time being of the United Kingdom and the Government of India or the Local Government. Any conspiracy to change the form of the Government of India or of any Local Government, even though it may amount to an offence under another section of the Code, would not be an offence under section 121A, unless it is a conspiracy to overawe such Government by means of criminal force, or show of criminal force.

Depriving His Majesty of the sovereignty of British India would obviously include the severance of the connection of India with the Imperial Government in England. Any conspiracy to establish the complete independence of India, as distinct from obtaining for it the status of a self-governing Dominion within the British Empire, would be tantamount to conspiring to deprive His Majesty of the sovereignty of British India. The same result would follow if there was a conspiracy to establish a perfectly democratic or republican form of government in India outside the British Empire.

The reference to "The Queen" in section 121A is not a reference to the personality of the Sovereign for the time being. No doubt section 13 of the Indian Penal Code defines "The Queen" as the Sovereign for the time being of the United Kingdom, but section 3(23) of the General Clauses Act provides that "The Queen" shall include her successors. For section 121A it is not necessary to establish that there is a conspiracy to deprive His Majesty the present King-Emperor of his sovereignty of British India, i.e. within the lifetime of the present King-Emperor; and the question whether the conspiracy is or is not expected or contemplated to succeed within the lifetime of the present King-Emperor is immaterial.

Sections 208 and 210 of the Criminal Procedure Code do not mean that once the Magistrate is satisfied that the prosecution has established a *prima facie* case and the accused should be committed to the court of session, he is still bound to take down all the remaining evidence for the prosecution; nor do they mean that if the Magistrate, after hearing part of the evidence of the accused, is satisfied that there is no case for commitment, he should nevertheless proceed to complete the recording of the entire evidence. The meaning is that if the Magistrate does not take all the evidence that the prosecution wishes to produce and discharges the accused

under section 209, or does not take all the evidence offered by the accused and nevertheless commits the accused under section 213, the order would be illegal. Section 347 also indicates that it is not correct to say that the Magistrate has absolutely no option but to hear the entire evidence on both sides, and that he cannot commit the case unless he has done so. The proper procedure is that the prosecution can place before the court all the evidence on which they wish to rely, but after evidence has been taken which is sufficient to make out a *prima facie* case, it is not necessary to call further evidence. Similarly if there is a mass of evidence tending to prove the same point, it is not necessary that all such evidence should be produced in the Magistrate's court before the charge is framed. Notice of all evidence to be produced in the sessions court ought, however, to be given to the accused before the trial, otherwise he would be prejudiced.

Queen-Empress v. *Hayfield* (1) and *Queen-Empress* v. *Stanton* (2), not approved.

At the stage of the preliminary inquiry into a case triable by the court of session, the prosecution should exercise a careful discrimination and make a proper selection of evidence so as to avoid unnecessary multiplication of evidence tending to establish the same point; much time can be saved thereby and the record is not unnecessarily overburdened. It is a matter for consideration by the legislature whether the procedure should not be further simplified so as to avoid duplication of trials.

Section 256(2) of the Criminal Procedure Code allows an accused to put in any written statement in the trial of a warrant case in the Magistrate's court. There appears to be no reason why, if the accused has already prepared a lengthy written statement, he should not be allowed to file it in the court of session. This would not of course relieve the court of the necessity of questioning him generally on the case in accordance with sections 342 and 364 of the Code. Much time of the court could be saved if such a written statement were accepted instead of allowing the accused to read it *in extenso* in court and having it recorded as he reads it.

The questioning of the accused referred to in section 342 is not meant to be a lengthy cross-examination as regards all the evidence produced by the prosecution.

(1) (1892) I.L.R., 14 All., 212. (2) (1892) I.L.R., 14 All., 521.

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A judgment has not to be a résumé of the entire evidence or a discussion of the relevancy of all the evidence. A court is entitled to select such evidence as it considers important and sufficient to prove the point in issue. Much time would be saved if the Sessions Judge does not feel himself called upon to discuss in his judgment all the evidence produced by the prosecution and the defence.

A document, of which the writer is not known, found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents as against the other accused.

Copies of printed newspapers containing an account of some proceedings, found in the possession of one accused, are not by themselves evidence of the truth of the facts stated therein, unless in connection with other facts they make the existence or non-existence of the facts mentioned highly probable or improbable within the meaning of section 11 of the Evidence Act.

The opinion of an expert that certain documents have been typewritten on the same machine is not admissible under section 45 of the Evidence Act which, as it stands, does not cover such expert opinion. The court may ask the witness to explain points in favour of his view, but must come to its own conclusion and not treat such opinion as expert opinion relevant by itself.

The theory of punishment is based upon (*a*) the protection of the public, (*b*) the prevention of crime and (*c*) the reformation of the offender. In the case of political offences, arising out of the beliefs of the accused, severe sentences defeat their object. In practice such sentences confirm the offenders in their beliefs and create other offenders, thus increasing the evil and the danger to the public.

Dr. *K. N. Katju*, Messrs. *R. S. Pandit*, *Bankey Behari*, *K. N. Laghate*, *Tek Chand* and Miss *S. K. Nehru*, for the appellants.

Messrs. *K. Mc. I. Kemp* and *J. P. Mitter*, for the Crown.

SULAIMAN, C. J., and YOUNG, J. :—This is an appeal by 27 accused persons in what is known as the Meerut conspiracy case. The trial has become somewhat notorious on account of its unprecedented duration.

All the accused persons, except Hutchinson, were arrested in March, 1929 (Hutchinson was arrested in June of the same year) and have all this time, except for the periods during which some of them were released on bail, been detained in jail. The trial commenced in the court of the committing Magistrate on a complaint filed on the 15th of March, 1929, and a supplementary complaint against Hutchinson on the 11th of June, 1929.

The entire proceedings have now lasted for nearly four years and a half. This is accounted for as follows: (1) The preliminary proceedings before the Magistrate took over seven months, resulting in the commitment of the accused to the court of session on the 14th of January, 1930. (2) In the sessions court the prosecution evidence took over 13 months; (3) the recording of the statements of the accused occupied over ten months; (4) the defence evidence lasted for about two months; (5) the arguments continued for over 4½ months; (6) the learned Sessions Judge took over five months thereafter to pronounce his judgment. (7) The last of the appeals was filed in the High Court on the 17th of March, 1933, and, as the paper books were all ready and printed, the 10th of April, 1933, was fixed for the hearing of the appeals. But the accused themselves applied for an adjournment of the hearing till after the long vacation, to which the Crown counsel agreed. Accordingly the 24th of July, 1933, was fixed for the appeals, on which date the arguments commenced, and having lasted for eight working days were concluded yesterday.

The case was conducted on a gigantic scale. The evidence consists of 25 printed volumes of folio size. There are altogether over 3,500 prosecution exhibits, over 1,500 defence exhibits, and no less than 320 witnesses were examined. The judgment itself is in two printed volumes covering 676 pages of folio size.

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A mass of documentary evidence consisting of papers in printed, typewritten and manuscript forms, books, pamphlets, letters, notes, slips and other documents found in the possession of the various accused at the time of the searches, as well as those found at the search of numerous other places have been produced, and there is a mass of oral evidence, both from India and England, to prove them. There is also voluminous evidence to prove the various political activities of all the accused and their association with each other.

We think it is necessary to make a few observations in regard to the proceedings :—

In the first place, there seems to be an erroneous impression that the entire evidence for the prosecution must be produced before the committing Magistrate, and that the Magistrate has no option to postpone the recording of such evidence. This view is based on the language of section 208 of the Criminal Procedure Code, under which the Magistrate is bound to take "all such evidence as may be produced in support of the prosecution or on behalf of the accused". Section 210 also says that when "upon such evidence being taken and such examination (if any) being made", the Magistrate is satisfied that there are grounds for committing the accused he shall frame the charge. But all that these sections imply is that the Magistrate should record all evidence for the prosecution which the complainant considers it necessary to produce. If the Magistrate stops the proceeding and does not take all the evidence that the prosecution wishes to produce, and discharges the accused under section 209, the order would be improper. On the other hand, if the Magistrate does not take all the evidence offered by the accused and nevertheless commits the accused to the court of session under section 213, the order would be illegal and is bound to be set aside. But these sections, in our opinion, do not mean that once the Magistrate

is satisfied that the accused should be committed to the court of session,—that is, that the prosecution has established a *prima facie* case—he is still bound to take down all the remaining evidence for the prosecution. Nor do they mean that if the Magistrate, after hearing part of the evidence of the accused, is satisfied that there is no case for commitment, he should nevertheless proceed to complete the recording of the entire evidence.

Indeed, there is an express provision in section 347 which requires that "If at any stage of the proceedings it appears to the Magistrate that the case is one which ought to be tried by the court of session, he shall commit the accused." The significance of the words " at any stage of the proceedings" obviously is that the Magistrate should commit even though he has not heard the entire evidence of both sides.

In *Queen-Empress* v. *Hayfield* (1) KNOX, J., expressed the opinion that the prosecution cannot produce a witness as of right, when he had not been examined by the committing Magistrate nor had he been examined by the Crown under the supplementary provisions of section 219 of the Criminal Procedure Code and at the sessions trial the accused had no knowledge of the nature of the evidence which he might give. It does not appear that section 347 of the Code was considered. It also appears that the learned Judge thought that the accused were being taken by surprise and were likely to be prejudiced. We think that although the ruling might be supported by the special facts of that case, and the rule laid down should be ordinarily applied, the law was too broadly stated.

In *Queen-Empress* v. *Stanton* (2) the same learned Judge remarked that the prosecutor was not free to select the evidence which should be produced at that stage—he was bound to produce all the evidence directly

(1) (1892) I.L.R., 14 All., 212. (2) (1892) I.L.R., 14 All., 521.

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bearing upon the charge. That observation also was made in a different connection and without any reference to the provisions of section 347.

The same learned Judge in *Queen-Empress* v. *Ahmadi* (1) again made a similar observation that a Magistrate inquiring into a case was not empowered to frame a charge or commit until he had taken all the evidence the accused might produce. But that was a case where the Magistrate had declined to hear the evidence tendered on behalf of the accused and had committed her for trial. The observation made by the learned Judge must be read in connection with the facts of that case.

The case of *Emperor* v. *Kunwar Jaswant Singh* (2), decided by another Judge of this Court, was also quite different. In that case the Magistrate had not asked the accused whether they had any evidence to produce. When an application was made on their behalf for the summoning of certain witnesses the application was rejected and the accused were committed to session. It was accordingly held that the order was illegal and must be set aside.

In our opinion it is not correct to say that the Magistrate has absolutely no option but to hear the entire evidence on both sides, and that he cannot commit the case to the sessions unless he has done so. This construction of these sections sometimes leads to two full trials—one before the committing Magistrate and the other before the sessions court.

We think that the prosecution can place before the court all the evidence on which they wish to rely, but after evidence has been taken which is sufficient to make out a *prima facie* case, it is not necessary to call further evidence. Similarly if there is a mass of evidence tending to prove the same point, it is not

(1) (1928) I.L.R., 20 All., 264. (2) (1923) I.L.R., 46 All., 137.

necessary that all such evidence should be produced in the Magistrate's court before the charge is framed. Notice of all evidence to be produced in the sessions court ought, however, to be given to the accused at the trial, otherwise he would be prejudiced. The mere fact that some evidence is not produced till proceedings in the court of session can in no way prejudice the accused if he has notice of it. If proper care is taken by the prosecution and by the accused as well as by the Magistrate concerned, the hearing in the Magistrate's court can be very much shortened.

In the second place, if the prosecution exercises a careful discrimination and avoids the piling up of evidence and the overburdening of the record, much time can be saved. Of course, no sessions court would refuse to examine witnesses who have been sent up by the committing Magistrate, or reject evidence which has been relied upon by him: *Queen-Empress* v. *Bankhandi* (1). But if a proper selection of evidence is made at the outset the volume of evidence can be kept within reasonable limits.

We think that there has been unnecessary multiplication of evidence in this case, resulting in the production of numerous documents tending to establish the same point.

We think that the legislature should consider whether the procedure should not be further simplified so as to avoid duplication of trials. It seems wholly unnecessary to have full hearings successively in the committing Magistrate's court and again in the sessions court. This necessarily prolongs the duration of the trial, involving a considerable waste of time, and is not always in the interest of the accused.

In the third place, the accused in their turn took an inordinately long time in reading out well prepared

(1) (1892) I.L.R., 15 All., 6.

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statements which the court had to take down word for word. In most cases they were nothing more than an exposition, on an elaborate scale, of the doctrines of Communism, its tenets and its programme. There has been an extravagant waste of time and energy in the dictation and recording of these statements.

Section 256(2) allows an accused to put in any written statement in the trial of a warrant case in the Magistrate's court. We do not see why, if the accused has already prepared a lengthy written statement, he should not be allowed to file it in the court of session. This would not of course relieve the court of the necessity of questioning him generally on the case in accordance with sections 342 and 364 of the Criminal Procedure Code. Much time of the court could be saved if such a written statement were accepted instead of allowing the accused to read it *in extenso* in court and to have it recorded as he reads it. The doubt of a single Judge of this Court in *Emperor* v. *Ansuiya* (1) was not so much against the filing of such a written defence but against its taking the place of the examination of the accused.

It is to be noted, however, that apart from sections 342 and 364 there is no section in the Code which permits an accused to make a statement at all in the sessions court. Section 342 enacts that the court shall question the accused generally to enable him to explain any evidence against him. The accused must confine himself to relevant answers to the questions asked by the court. The Judge has power to refuse to record irrelevant answers, and, if necessary, may prevent the accused making lengthy irrelevant answers.

Section 289 refers to "the examination (if any) of the accused". It *prima facie* implies the possibility of there being no examination of the accused. But that

(1) Weekly Notes, 1903, p. 1.

is up to the stage when he is asked "whether he means to adduce evidence". This section has to be read in conjunction with the provisions of section 342 of the Code which makes it the duty of the court, for the purpose of enabling the accused to explain any evidence against him, to question him generally on the case "before he is called on for his defence". But the questioning of the accused referred to in the section is not meant to be lengthy cross-examination as regards all evidence produced by the prosecution. If in a big trial the accused is at that stage called upon to explain all the evidence, he would naturally begin to argue his case before his defence is called on, which obviously is not contemplated.

It seems to us that the following form of question put to an accused is not only unnecessary but also likely to lead to lengthy answers:

Q.—The following documents are in evidence against you. (Then a large number of exhibits are named.) Have you anything to say in explanation of the above evidence?

Such a question would invite an argumentative explanation of each of the documents mentioned.

In the fourth place the length of the trial can be shortened if the accused also were to exercise a proper discretion in producing defence witnesses. In this case it seems to us that they were ill-advised to produce an unnecessarily large number of witnesses.

In the fifth place, the length of arguments depends to a great extent on the volume of evidence that has already been brought on the record. If that volume is reduced the arguments are bound to be shortened in proportion.

In this connection it may be mentioned that the Government at great expense had the whole of the oral and documentary evidence printed in the court below and thereby provided every facility to the court and counsel in examining that evidence.

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In the sixth place, much time would be saved if the Sessions Judge does not feel himself called upon to discuss in his judgment all the evidence produced by the prosecution and the defence. A judgment has not to be a résumé of the entire evidence or a discussion of the relevancy of all the evidence. A court is entitled to select such evidence as it considers important and sufficient to prove the point for consideration.

We feel that if the learned Sessions Judge had not discussed the entire evidence with minute detail, he need not have written so lengthy a judgment and need not have taken so much time.

At the same time we must express our high appreciation of the great care which the Judge has taken and the great perseverance and patience which he has shown in hearing this case. He has been so accurate and exact in his statement of facts that counsel for the appellants have not been able to draw our attention to any passage in the judgment which contained a wrong or incorrect statement of fact or gave a wrong reference to exhibits. Considering that the evidence before him was so vast and his judgment covers so many pages, it is very creditable to him that he has been able to be so particular.

But we must express our feeling that if there had been a greater discrimination in the choice and selection of evidence for the prosecution, a greater restraint by the accused in keeping their statements within the limits of relevancy and a little more strictness on the part of the court, the trial would not have taken such a long time.

As regards the appeal we would like to acknowledge that counsel for both sides here in this Court have given us great assistance in deciding the case. In particular, Mr. *Kemp*, counsel for the Crown, who obviously knew every detail of the evidence, was always able to refer us promptly to relevant evidence without any loss

of time whatsoever. In his arguments he has been very fair to the accused and has drawn our attention also to circumstances which are in their favour.

We now come to the facts.

The appellants have been convicted of an offence under section 121A of the Indian Penal Code (Act XLV of 1860). The charge against them was that in and between the years 1925 and 1929, within and without British India they agreed and conspired together with one another, and other persons and bodies, to deprive the King-Emperor of the sovereignty of British India.

As there has been considerable argument as to the exact implications of this expression in the section, it may be convenient to dispose of that argument at an early stage.

Chapter VA of the Indian Penal Code deals with criminal conspiracy; and chapter VI deals with offences against the State. Criminal conspiracy is defined in section 120A in the following terms: "When two or more persons agree to do, or cause to be done, (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. *Explanation.*—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

This section adopts the definition of criminal conspiracy as understood in England. In *Mulcahy* v. *The Queen* (1) WILLES, J., in delivering the opinion of the Judges consulted by the LORD CHANCELLOR, remarked in his 11th answer at page 317 as follows: "A conspiracy consists not merely in the intention of

(1) (1868) L.R., 3 H.L. (E. and Ir.), 306.

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two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. And so far as proof goes, conspiracy, as GROSE, J., said in *Rex* v. *Brissac* (1) is generally 'matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them'." This opinion was accepted by the LORD CHANCELLOR and the other LORDS.

Section 121 of the Indian Penal Code is in the following terms: "Whoever wages war against the Queen, or attempts to wage such war, or abets the waging of such war, shall be punished with death or transportation for life."

Section 121A deals not only with depriving the Queen of the sovereignty of British India but also with conspiracy to overawe, by means of criminal force or the show of criminal force, the Government of India or any Local Government. The word "Queen" is defined in section 13 as denoting the Sovereign for the time being of the United Kingdom of Great Britain and Ireland and would therefore mean His Majesty who is King-Emperor at the present moment.

The section obviously draws a distinction between the Sovereign for the time being of the United Kingdom and the Government of India or the Local Government. It may therefore be conceded in favour of the accused that any conspiracy to change the form of the Government of India or of any Local Government, even though

(1) 4 East, 171.

it may amount to an offence under another section of the Code, would not be an offence under section 121A, unless it is a conspiracy to overawe such Government by means of criminal force, or show of criminal force. The accused have not been charged with any such offence. Depriving His Majesty of the sovereignty of British India would obviously include the severance of the connection of India with the Imperial Government in England. It cannot therefore be questioned that any conspiracy to establish the complete independence of India, as distinct from obtaining for it the status of a self-governing Dominion within the British Empire, would be tantamount to conspiring to deprive His Majesty of the sovereignty of British India. The same result would follow if there was a conspiracy to establish a perfectly democratic or republican form of Government in India outside the British Empire. This position has not been seriously disputed by the learned counsel for the appellants.

What was strenuously urged was that the reference to the Queen in the section was a reference to the personality of the Sovereign for the time being. The contention which has been very strongly urged is that unless it be established that there is a conspiracy to deprive His Majesty King George the Fifth of England of his sovereignty of British India there would be no offence within the meaning of the section. The contention is carried further and it is argued that unless the conspiracy is directed against the sovereign rights personally enjoyed by His Majesty, there would be no offence. On this assumption a further argument is built that unless the prosecution establish that it was in the contemplation of the accused to deprive the King-Emperor of the sovereignty of British India in the lifetime of the present King-Emperor, the offence would not be brought home to the accused. We do not think

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that we need discuss these contentions at any considerable length, as, in our opinion, they have no force whatsoever. This argument overlooks the fact that in law the King never dies. It is enough for the prosecution to prove that there was a conspiracy to deprive the King-Emperor of the sovereignty of British India. It is not necessary to show further that the conspirators were conspiring for such deprivation to take place within the lifetime of His Majesty the present King-Emperor. No doubt section 13 of the Indian Penal Code defines the word "Queen" used in section 121A as the Sovereign "for the time being" of the United Kingdom of Great Britain and Ireland. But section 3, clause (23) of the General Clauses Act (Act X of 1897) provides that the "Queen" shall include her successor. And so the question whether the conspiracy is expected to succeed in the lifetime of His Majesty the King-Emperor or that of his successor is wholly immaterial.

It is important to note that the offence of criminal conspiracy is complete as soon as two or more persons agree to do or cause to be done an illegal act, or an act which is not illegal by illegal means. It is immaterial whether the illegal act is the ultimate object of such an agreement or is merely incidental to that object. For the purpose of section 121A it is not necessary that any act or illegal omission shall take place in pursuance of the conspiracy. The agreement in itself is enough to constitute the offence.

The case for the prosecution was put forward in the complaints which were filed before the Magistrate. It is not necessary to recite them at length. Their gist is as follows:

(1) That there exists in Russia an organisation called the Communist International, whose aim is to overthrow all existing forms of government throughout the world by the creation of armed revolution and to replace them

by Soviet Republics controlled by the Central Soviet Government in Moscow; that the Communist International has outlined a programme or plan of campaign for the overthrow of other governments by means of general strikes and armed uprisings, the preliminary steps being the creation of Workers and Peasants' Parties, Youth Leagues, Trade Unions etc., and the introduction of fractions of groups of Communists into such bodies, the encouragement of strikes, propaganda by speeches, newspapers, literature etc.

(2) That the Communist International carried on its work and propaganda through various committees, branches and organisations controlled by its own executive committee and various sub-committees.

(3) That the Communist Party of Great Britain is a section of the Communist International.

(4) That in 1931 a branch organisation of the Communist International was established in British India by a number of Communists including the accused Dange, Shaukat Usmani and Muzaffar Ahmad, who conspired together to deprive the King-Emperor of his sovereignty of British India.

(5) That the accused Spratt and Bradley were sent out to India by the Communist International, through the medium of one of its branches, for furthering its aims.

(6) That all the accused, although residing at different places, conspired with each other and other persons to deprive the King-Emperor of the sovereignty of British India and carried out the programme and plan of campaign laid down by the Communist International at various places.

(7) And that, in particular, the accused formed a Workers and Peasants' Party at Meerut and held a conference of it at that place.

It is not now disputed that a Communist International exists in Moscow nor is it disputed that there is a Communist Party of Great Britain. It is equally admitted

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that a Communist Party of India was formed and existed in British India.

It is convenient to divide the 27 accused into four groups :

The first group consists of twelve accused, namely, (1) Muzaffar Ahmad, (2) Dange, (3) Ghate, (4) Joglekar, (5) Nimbkar, (6) Mirajkar, (7) Usmani, (8) Sohan Singh Josh, (9) Majid, (10) Ajodhia Prasad, (11) Adhikari and (12) Shamsul Huda, all of whom are members of the Communist Party of India.

The second group consists of two accused, (1) Spratt and (2) Bradley, who are members of the Communist Party of Great Britain but not members of the Communist Party of India.

The third group consists of six accused, (1) Goswami, (2) P. C. Joshi, (3) Chakravarti, (4) Basak, (5) Hutchinson and (6) Mittra, who, it is now admitted, are communists by conviction, but did not become members of the Communist Party of India.

The fourth group consists of the remaining seven accused, namely, (1) Desai, (2) Jhabwala, (3) Sahgal, (4) Alve, (5) Kasle, (6) Gauri Shankar and (7) Kadam, who are not communists and who have never been members of the Communist Party of India. They assert that they are political workers belonging to either the Peasants and Workers' Associations, or Trade Unions or the Congress, and deny that they have ever belonged to any communist organisation or joined in any conspiracy.

Having regard to the difference in the nature of the defences put up by the accused of these various groups, their cases have to be examined separately. It will be convenient to take the accused in the groups into which they naturally fall.

The First Group

It seems to us that the prosecution case against the 12 accused who are admittedly members of the Communist

Party of India is both clear and simple. They knowingly became members of the Communist Party of India of which we know the constitution as well as the report of its working for the first year.

P. 1207 (i) printed in Volume V(*b*) (Parties) at page 964 onwards is admittedly a genuine document and contains the annual report of the executive committee of the Communist Party of India for 1927 as well as its constitution for that year.

The Introduction mentions that "the aftermath of the War had created an all-round discontent and the masses were everywhere seen in a revolutionary mood which could not find a way for radical action, owing to lack of bold leadership." It points out that "at the time of the non-co-operation movement the masses joined the struggle with great zeal which led India almost to the verge of a great political upheaval." It recites as a matter of history that the previous arrest of Muzaffar Ahmad and Dange on a charge of conspiracy brought into light "the programme of a national revolution that was proposed by the revolutionary leaders of world reputation for India", and that the Indian Communist Party was started which attracted a number of people who were enlisted as its members, and that "among the ideals, the attainment of complete independence was kept in the forefront".

The report, having given a short history of the birth of the Communist Party of India, proceeds to record "the work done by the executive". Under the heading "Record of work done during the period" it points out that in Bengal work was done in re-building the already existing Peasants and Workers' Party in that province; in Lahore work was done in educating the masses; in Bombay a left-wing organisation was found necessary and there was success in having a Workers and Peasants' organisation which had already commenced work amongst the industrial workers with their organ

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the "Kranti". In Rajputana a Workers and Peasants' Party had been started and efforts would be made to organise industrial labour; in Madras propaganda work was being done through Trade Unions and strike activities; and in the United Provinces and other provinces owing to lack of sufficient financial resources no effective left-wing had been organised, but a favourable atmosphere for labour activities had been created.

The report then contains what is called "The Constitution of the Communist Party in India, 1927". It is significant to note that in paragraph 2, which formulated the conditions of membership, it is provided that "only those subscribing to the programme laid down by the Communist International will be eligible for its membership." It provides for a central executive, for a "Presidium", for a foreign bureau, and "fractions". The foreign bureau was to act as the organ through which the international relations of the Party would be maintained and was to keep a constant touch with all the communist parties and the Comintern, i.e. the Communist International.

In paragraph 20 it was provided that the Communist Party of India at its annual sessions would formulate a regular programme and policy to be carried out, and to form party groups called Comrades Fractions to work in the National Congress and the Trades Union Congress on behalf of the party.

This report contains a number of resolutions including (1) That the party looks up to the communist parties of the world as well as the International, for lead and guidance. Then follows the "programme". After pointing out that only the dynamic energies of the toiling masses can bring swaraj to India, the communists were called upon to formulate a common programme on the lines of the following minimum programme: (*a*) Complete national independence and the establishment of a democratic republic based on universal adult suffrage, etc.

Several points emerge from this document.

The first is that it was believed that the masses were seen in a revolutionary mood and that at one time the masses joined the struggle with great zeal, which brought India almost to the verge of a great political upheaval.

The second is that the Communist Party is confined only to such members as subscribe to the programme laid down by the Communist International. Those who do not subscribe to such a programme are not eligible for membership at all.

The third is that the minimum programme prescribed by the party was complete national independence.

The only explanation which the learned counsel for these appellants has offered is that the word "programme" in this document has been loosely used for "aims and objects", and that what the Communist Party in India had set before itself was not a programme but an ultimate aim and object which may not *per se* be punishable. Reading the document as a whole, including the introductory portion, the history of the movement, the constitution of the party and the programme before it, we can have no doubt that the members of this party agreed together to achieve by action what was laid down therein as the minimum programme.

As the members bound themselves to abide by the programme of the Communist International it is necessary to see what that programme is. P. 2398 is a copy of the programme of the Communist International which is admitted to be a genuine copy. We can therefore safely quote from it. The Introduction mentions that the Communist International openly advocates the violent overthrow of the bourgeois order by means of the Communist revolution and that the programme (for 1924, which was in force in 1927) shows the way to victory over the bourgeoisie.

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The first section deals with what is called capitalist wage slavery. The second section deals with the emancipation of the worker and the communist order. The third section deals with the fall of the bourgeoisie and the fight for communism.

The first head under this section is "The general characteristics of the transition period" which is a period of national war, of colonial uprisings etc.

The second is "The dictatorship of the proletariat as the unavoidable pre-requisite of the struggle for communism." It points out the necessity of the proletarian dictatorship and says:

"An unavoidable premise for the transition from capitalism to communism—the starting point without which the further evolution of mankind is entirely impossible—is thus revolutionary overthrow of the bourgeois State and the seizure of power by the working-class, which is to set itself the first and most important task of suppressing the enemy and formally establishing the new régime—the dictatorship of the proletariat, that is the most elementary pre-requisite for social evolution."

It then mentions the destruction of the bourgeois State by the organs of proletarian class war and says:

"The seizure of power by the proletariat is nothing less than the destruction of the bourgeois State apparatus by the fighting organs of the proletarian class struggle and the organisation of a new proletarian class power by those organs."

It goes on to emphasise the destruction of the bourgeois monopoly of armies and the concentration of these in the hands of the proletariat and says:

"An essential part of the seizure of power by the working class is the destruction of the bourgeois monopoly of armies and the concentration of armies in the hands of the proletariat. During the course of the struggle the main object in view must be the disarmament of the bourgeoisie and the arming of the proletariat."

The 4th section points out the road to the dictatorship of the proletariat and lays down the strategy of the Communist Party and the tactics to be adopted.

The paragraph under the head "Revolutionary situation and Party Tactics" may be quoted *in extenso* (p. 36) :—

"Given a direct revolutionary situation, when the ruling classes are more or less disorganised, when the masses are in a state of revolutionary excitement, when the intermediate strata are inclined to go over to the side of the proletariat—the party of the proletariat is confronted with the task of leading the masses to the direct attack on the bourgeois State. This is achieved by the advancement of more marked slogans and the increasing intensity of mass movements, to which must be subordinated all branches of party agitation and propaganda, including parliamentary activities. These comprise strikes, combination of strikes and demonstrations, combination of armed demonstrations and strikes, and finally the general strike in conjunction with the highest form of the direct military fight against the State power of the bourgeoisie. This fight is subject to military rules; it presupposes a military plan (the fixing of time and place etc.), aggressive operations and undivided loyalty and heroism on the part of the proletariat. Such actions presuppose the organisation of the broad masses into militant bodies, which by their very form should attract and set into motion the largest number of toilers (Council of workers and peasant deputies, soldiers' councils etc.). A pre-requisite for victorious tactics is propagandist work in the army and navy."

It is unnecessary to quote other extracts. The whole programme from beginning to end shows, without a shadow of doubt, that the programme laid down is the overthrow of the existing order of society and government by the use of force with ultimate resort to arms.

A revised programme of the Communist International was printed in 1929. It is P. 2339, the genuineness of which also is admitted. It is much in the same terms. Under the section dealing with the period of

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transition it equally emphasises that the conquest of power by the proletariat is a necessary condition precedent, and that it does not mean peacefully capturing the ready-made bourgeois State machinery by means of a Parliamentary majority; that the violence of the bourgeoisie can be suppressed only by the stern violence of the proletariat; the conquest of power by the proletariat is the violent overthrow of bourgeois power, the destruction of the Capitalist State apparatus (bourgeois armies, police, bureaucratic hierarchy, the judiciary, parliaments, etc.) and substituting in its place new organs of proletarian power.

It is not necessary to quote other extracts, but it may be pointed out that among the fundamental tasks of communist strategy and tactics it is provided that

"The Communist Party must openly recognize the rights of the Colonies to separate and their right to carry on propaganda for this separation, i.e., propaganda in favour of the independence of the Colonies from the Imperialist State; they must recognize their right of armed defence against Imperialism (i.e., right of rebellion and revolutionary war) and advocate and give active support to this defence by all the means in their power."

The mass action is stated to include :

"Strikes; a combination of strikes and demonstrations; a combination of strikes and armed demonstrations; and finally the general strike conjointly with armed insurrection against the State power of the bourgeoisie. The latter form of struggle which is the supreme form must be conducted according to the rules of war, it presupposes a plan of campaign, offensive fighting operations and unbounded devotion and heroism on the part of the proletariat. An absolutely essential condition precedent for this form of action is the organisation of the broad masses into militant units, which, by their very form, embrace and set into action the largest possible numbers of toilers (Councils of Workers' Deputies, Soldiers' Councils, etc.), and intensified revolutionary work in the army and the navy."

"The Communist Parties in the Colonial and semi-Colonial countries must carry on a bold and consistent struggle against foreign Imperialism."

And they are warned that "Failure to take advantage of the culminating point in the development of the revolutionary situation, when the party of the proletariat is called upon to conduct a bold and determined attack upon the enemy, is not less dangerous. To allow that opportunity to slip by and to fail to start rebellion at that point means to allow the initiative to pass to the enemy, and to doom the revolution to defeat."

It is apparent from these few extracts alone that the members of the Communist Party of India, who subscribe to this programme of the Communist International, have undoubtedly formed a revolutionary body with the professed object of overthrowing the present order of society and bringing about the complete independence of India by means of armed uprisings of the proletariat, which includes the workers and the peasants.

The contention of the learned advocate for the appellants that such an objective is a distant aim to be realised in the unknown far off future cannot be accepted for a moment. No doubt the communists would, as a tactical measure, begin with the preliminary stages in the first instance, but whenever conditions become favourable they would adapt themselves to those conditions and resort to armed revolution, if necessary. Nowhere in the programme is it suggested that such an armed revolution is not to be brought about within any period of time. The question is entirely one of opportunity, and the opportunity has to be seized and not lost sight of as soon as it occurs.

That the object in view is not a mere dream of the communists which may be realised after several generations beyond the lifetime of the present accused is apparent from their own statements made before the sessions court. The accused Nimbkar read a long written statement in court which was ultimately

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accepted by all the communist accused persons, and has been called their joint statement. It contains an exposition and elaboration of the theories of communism and extends to such a length as to have caused an inexcusable waste of time of the court. The statement says :

"When we are trying to set up an entirely new system of laws we cannot be expected to pay very much respect to the existing one . . . We fully subscribe to the system of thought and the well thought out and scientific political programme laid down for the world revolution by that most powerful worldwide revolutionary organisation, the Communist International. . . While we assert our general deterministic view we do not attempt to use this as an argument by which to escape from the consequences of our actions or to minimise them in the eyes of the court; on the contrary we lay the greatest possible stress upon the importance of conscious revolutionary activity, organisation and leadership."

It goes on to state that the Indian national revolution is inevitable, and, in describing the attitude of the accused towards Indian affairs, says :

"We consider that the way in which the economic and political life of the world generally and of India in particular has developed makes it certain that the Indian national revolution, now developing, will culminate fairly soon in the revolutionary overthrow of the British Imperialist rule."

It then goes on to admit that :

"We have no objection to the help of the Communist International and the Russian working class; in fact, we consider that India should welcome such help."

Every attempt has been made to emphasise in this long statement the inevitability of violent revolution. We consider it wholly unnecessary to burden our judgment with further extracts from this statement. It leaves no doubt in our minds that the violent overthrow of the present order of society and bringing about the independence of India by means of an armed revolution is not a distant but an immediate object, although in

the absence of favourable conditions the spade work has to be done as a matter of policy and tactics. We are fully convinced that any group of persons, who formed themselves into a party and placed before themselves a programme of this type and agreed to give effect to it to the best of their ability, have undoubtedly conspired to deprive His Majesty the King of his sovereignty of British India. There can be no manner of doubt that on these admitted facts, and on the statement of the accused themselves, the offence with which they have been charged has been fully established. We could have multiplied extracts from their statements, extracts from speeches made by them, and extracts from their writings to show that these are their professed object, programme, and plan of action. We, however, consider it unnecessary to go any further, and on the evidence mentioned above we unhesitatingly record a finding that these accused persons have been rightly convicted of the offence under section 121A.

As frequent references will have to be made to some of the parties and unions that were formed, and an appreciation of their constitutions would be useful in considering the cases of some of the accused, it is convenient at this place to discuss them, before taking up the case of each accused.

In addition to the Communist Party of India, which has already been discussed, there came into existence towards the end of 1928 an All India Workers and Peasants' Party. This was subsequent to the formation of Provincial Workers and Peasants' Parties. Advantage was taken of the Christmas session of the Congress at Calcutta, and the first All India Workers and Peasants' Party conference was convened during the Christmas of December, 1928. The President-elect was the accused Sohan Singh Josh, and the secretary of the reception committee was the accused Goswami. It was on this occasion that the All India Workers and

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Peasants' Party was formed. There are two copies of the constitution of this Party. Both show that the object of the Party was the attainment of complete freedom from imperialism in general and British Imperialism in particular, and a thorough democratisation of India based on economic, social and political emancipation of the masses. But the means for the attainment of this object was stated to be the Party programme adopted from year to year at the annual session of the Party or at any extraordinary congress called for the same purpose. It is to be noted that the constitution did not say that the Party adopted the programme of the Communist International or that its members would in any way be bound by the decision of any communist party. Anyone seeking to be a member who read the constitution would not necessarily conclude that it was a communist organisation. Nor would it follow that anyone who was invited to the All India Workers and Peasants' Party Conference would necessarily be aware that speeches in pursuance of the aims and objects of communism would be made at such a conference.

The fact, however, remains that at this Calcutta conference a number of resolutions accepting several theses, which were presented to, or perhaps read at, the conference, were adopted. We have also the presidential address delivered on the occasion by the Communist President. A few extracts from these may be quoted with advantage.

[These extracts are omitted here.]

It is, therefore, quite clear that although the constitution of the All India Workers and Peasants' Party did not in itself disclose that it was a communist organisation, there is no doubt that the party was organised and formed by communists and that the presidential address delivered at the conference and the theses accepted by resolutions advocated communist doctrines and principles and urged the adoption of the communist programme.

Then there were Workers and Peasants' Parties in the various provinces. These stand on a slightly different footing. There was the Workers and Peasants' Party of Bengal, which when originally formed stated the object of the party to be the attainment of swaraj in the sense of the complete independence of India based on economic and social emancipation and political freedom of men and women, but as to means to be adopted the constitution enjoined non-violent mass action as the principal means for the attainment of the above object. But later on the constitution was amended and the mention of non-violent action was dropped and for it was substituted "The rallying of the people to mass action will be the principal means for the attainment and realisation of the above objects". But there was nothing in the constitution of this party on paper to suggest that it was a communist organisation. It is not suggested even by the prosecution that it was so.

The Workers and Peasants' Party of Bombay had as its object the establishment of swaraj (complete national independence) wherein the means of production, distribution and exchange are publicly owned and socially controlled. The immediate political demands and the economic and social demands enumerated in it were those which might be put forward by a socialist organisation. There was nothing in the constitution to suggest that it was a communist party, nor were its members bound to follow the communist programme.

There was also a Workers and Peasants' Party in the Punjab which has as its aims and objects the securing of complete independence from British Imperialism by every possible means, to liberate workers and peasants from every sort of political, economic and social slavery and the establishment of a united socialists' republic. This party was called the Kirti Kisan Party. The constitution did not disclose

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that this association was necessarily a communist organisation; although there is no doubt that the leading members of it were communists.

The prosecution case is that in the United Provinces also a Workers and Peasants' Party was formed at Meerut. This fact was not admitted on behalf of the accused who were said to be its members. But there is no doubt that several letters issued under the signature of the accused P. C. Joshi were on printed forms which described him as the general secretary of the Workers and Peasants' Party, U. P. It is not necessary to discuss all the evidence, but there seems to be no doubt that on the occasion when a conference of the Mazdur Kisan Sangh (admittedly not a communist organisation) was being held at Meerut, advantage was taken of the opportunity and a Workers and Peasants' Party of the U. P. was formed. There is also evidence to show that a newspaper, the "Kanti Kari", was regarded as its organ. But the constitution of this party is not available, and therefore apart from the fact that some of its members were professed communists, it cannot be definitely stated that the newly formed Workers and Peasants' Party, U. P., was a communist organisation.

Although the constitutions of the provincial parties do not themselves show that they were communist organisations, there is no doubt that the formation of such bodies is a part of the programme laid down by the Communist International and is in furtherance of its aims and objects.

As regards the conference of the Mazdur and Kisan Sabha held at Meerut, it is not said that the conference itself was a communist conference, though the Presidential address delivered on the occasion praised the Soviet Government and the lead it had given to the Trade Union movement.

Before dealing with the evidence it is necessary to mention the question of the admissibility of a number

of documents which has been raised on behalf of the accused. We have considered a good many of them to be admissible, though we do not think it necessary to discuss the question of admissibility separately in respect of each. On the other hand, there have been some documents which we have excluded from our consideration altogether on the ground of their inadmissibility. We do not propose to discuss each document separately, but we think it sufficient to point out the principles which we have followed, and on which we have acted:

1. We have considered that the execution or authorship of a "document" is a question of fact and may be proved like any other fact.

2. In such a case a document may be "proved", as defined in section 3 of the Evidence Act, "when the court considers its existence so probable that a prudent man ought, under the circumstances, to act upon the supposition that it was written by the person alleged to be its author, even though no direct proof of his handwriting is given." Thus a document may be proved both (i) by direct evidence, and (ii) by circumstantial evidence.

3. (1) (*a*) Before the provisions of section 10 of the Evidence Act can be invoked it has to be established from independent evidence that there is reasonable ground to believe that two or more persons have conspired together to commit an offence.

(*b*) When this is shown, (i) anything said, (ii) anything done, or (iii) anything written by any one of such persons, would be a relevant fact as against each of the other conspirators; provided that "it is in reference to their common intention".

(*c*) Such things said, done or written would be relevant for the purpose of (i) proving the existence of the conspiracy, and also (ii) for showing that any such person was a party to it.

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3. (2) (*a*) In section 10 "anything said" would include the statements made, speeches delivered, or declarations made; (*b*) anything "done" must be some act done, and not merely the intention or knowledge of the person; (*c*) anything written would include (i) a manuscript, whether signed or unsigned, written by the person, and (ii) matter transcribed by him on a typewriter.

4. But a document, of which the writer is not known, found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents as against the other accused. The fact of possession would be evidence to show that the conspirator, in whose possession it is found, had received and preserved it.

5. Section 11 of the Act makes a "fact" inconsistent with any fact in issue or relevant fact, relevant. It applies to facts not otherwise relevant under the preceding sections. It does not make all documents, which make the existence or non-existence of a relevant fact probable or improbable, relevant. The expression "highly probable or improbable" is significant. It indicates that the connection between the facts in issue and the collateral facts sought to be proved must be so immediate as to render the co-existence of the two highly probable. The relevant facts under this section either (i) exclude, or (ii) imply more or less distinctly, the existence of the facts sought to be proved.

6. Copies of printed newspapers containing an account of some proceedings, found in the possession of one accused, are evidence of the fact of the publication of such an account in that paper, but are not by themselves evidence of the truth of the facts stated therein, unless in connection with other facts they make the existence or non-existence of the facts mentioned "highly probable or improbable".

7. The opinion of an expert to the effect that one document has been typewritten on the same machine

as another document is not admissible under section 45 of the Evidence Act. It is for the legislature to consider whether the section should not be amended; but as it stands, it does not include such expert opinion. The court may ask the witness to explain points in favour of the view whether the two documents have or have not been typewritten on the same machine, but must come to its own conclusion and not treat such assistance as an expert opinion—a relevant fact in itself.

8. The identity of the machine on which two letters have been typewritten would not by itself show that the writer of the two is one and the same person. But such a conclusion may be drawn from additional evidence, e.g., internal evidence afforded by the document, or external circumstances, or the continuity of the correspondence passing between the sender and the addressee.

9. Even in a criminal case where secondary evidence has been adduced in place of primary evidence, the provisions of sections 65 and 66 of the Evidence Act are applicable and must be complied with before such secondary evidence is admitted.

10. In order to establish that the accused were in correspondence with an individual going by the name of M. N. Roy in Berlin it is not incumbent upon the prosecution to establish that any of the letters were, in fact, written by any particular M. N. Roy. It is enough to show that some person living in Berlin was in conspiracy with the accused and correspondence was passing between them.

The activities of the various accused have been dealt with at considerable length in the judgment of the learned Sessions Judge, and the substantial accuracy of the main facts mentioned therein—as distinct from inferences drawn from facts or the admissibility of some documents, has not been seriously disputed before us. We, however, do not propose to go into the matter in

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any great detail, and shall content ourselves with mentioning the important facts only.

No. 1, *Muzaffar Ahmad*—Muzaffar Ahmad was elected to the executive committee of the Communist Conference at Cawnpore in December, 1925. He was a member of the executive committee of the Peasants and Workers' Party of Bengal in 1926. According to his own statement he had published in England a manifesto addressed to the Congress by the Communist Party of India, and contributed articles to "Ganawani". He was elected to the Presidium of the Communist Party of India in May, 1927. He was not only a member of the Workers and Peasants' Party of Bengal, but took part in the foundation of the All India Workers and Peasants' Party and edited the Bengal Party paper. He appears to have been referred to under a pseudonym in letters sent secretly in cipher code, and he also used cover addresses. Some of his letters addressed to persons in Berlin and referring to the publication of the "Call to Action", and the failure of money sent from Berlin to reach India, were intercepted and withheld by the police. He took part in the meeting of the enlarged executive committee of the Bombay Party. Muzaffar Ahmad's activities were not limited to party organisations and to correspondence with other accused but extended to Trade Union work. Indeed, the learned Sessions Judge has traced his whole career in detail, which ground it is not necessary for us to traverse. In his statement before the court Muzaffar Ahmad said: "I am a revolutionary communist. I had been a member of the Communist Party till the day of my arrest in connection with this case. Our party fully believed in the policy and principle and programme of the Communist International and propagated them as best it could under the circumstances. I am proud to state that with all my drawbacks I am one of the early pioneers of the communist movement in this country."

Referring to the seizure of power he said: "The essential problem of any revolution is seizure of power. At present the British Imperialism is in control of State Power in India. This Imperialism must, therefore, be overthrown. As the Workers and Peasants will overthrow Imperialism they will naturally capture the State Power but they will not capture the power in order to maintain the State form as it is now. They will smash the present State form into pieces and establish in its place the Workers and Peasants' Republic based on the organ of the real mass power, the Soviet."

Regarding the work done by the communists in the Peasants and Workers' Party and in Trade Unions he said: "The first and foremost duty of the C. P. I. (the Communist Party of India) was therefore to create militant Trade Unions, inside which alone these revolutionary cadres could grow. This is why the members of the Communist Party of India worked almost whole time in building Trade Unions inside the Workers and Peasants' Party which had been giving the Trade Union movement a militant shape."

He had been convicted in the Cawnpore communist conspiracy case in 1924 and was released on medical grounds in 1925. From the time of his release from jail till the time of his arrest he took a prominent and active part in many activities of the Communist Party of India.

No. 2, *Dange*—Dange was released in May, 1927, after his conviction in the Cawnpore communist conspiracy case. He was elected to the Presidium of the Communist Party of India. His own statement shows that he fully believes in the principle of communism and the programme of the Communist International. He had been an active member of the Communist Party of India till his arrest. He also became a member of the Workers and Peasants' Party

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and took active part in its activities. He was the editor of "Kranti" and also became the general secretary of the Girni Kamgar Union and took part in the textile strike. He took an active interest as a communist in Trade Unions and also in the All India Trade Union Conference, was a member of the provincial committee of the All India Workers and Peasants' Party and participated in "the Council of War" in September, 1928.

In his statement before the Magistrate he said that he was a communist and affirmed that statement in the Sessions court. He said: "The aim of the communist is the overthrow of imperialism and capitalism and the immediate aim of the communists in India is the overthrow of British imperialism." There is, however, one difference. He has stated that violent revolution is not inevitable and that peaceful evolution is a possibility. He suggests that although not adhering strictly to the principle of non-violence he had asked that the strike in which he took part should be conducted peacefully and explains that the principle that no class power is overthrown except by violent revolution is a deduction from historical experience, showing the inevitable way taken by all social revolutions in the past and that to be taken by them in the future also. He has admitted that his party used to describe the volunteers during the strike as the Red Army, Red Coats, etc.; he explains that by using these epithets they were not organising a real Red Army. He does not deny that after the termination of the big strike people were told that they should have 5,000 drilled volunteers ready.

No. 3, *Ghate*—Ghate was connected with the Communist Conference at Cawnpore in December, 1925. He does not appear to have made many speeches, but he wrote considerably, as he was in charge of the secretariat work of the Communist Party. No less than 74 documents in Ghate's own handwriting have been

produced and there are numerous other documents which mention him. He has been connected with the Communist Party of India throughout its existence and successfully maintained communications with people abroad. He was writing letters to many people in his capacity of joint secretary of the Communist Party of India. He was elected assistant secretary at the Delhi session of the All India Trade Union Conference. Later on he was elected the general secretary of the Communist Party of India. He took part in the organisation of the Workers and Peasants' Party of Bombay in 1927. Some of the letters sent out by him were sent out under cover addresses. Ghate took part in the enlarged executive committee meeting of the Workers and Peasants' Party of Bombay, was elected to the editorial board of the "Kranti", and was also on the financial committee of the Party. He was the secretary of the Workers and Peasants' Party of Bombay. He was in constant correspondence with the other accused. He took part in the All India Workers and Peasants' Party Conference at Calcutta and supported a resolution for the formation of an All India Party. He was a member of the provincial committee of the All India Party and took part in "the Council of War" in September, 1928.

In his statement he has said:

"An honest, genuine revolutionary working class party is therefore necessary and that is the Communist Party of India which alone can truly represent the interest of the toiling masses."

He also says:

"The World Communist Party, that is the Communist International, is perhaps the most organised force of the working class of the oppressed peoples. It is the dynamic force which organised the workers by participating in their daily struggle and leads them to the final seizure of power . . . Communists want to smash the existing State machinery and build a new one in its place during the transition to communism. . . The State machinery in India

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exists in the interest of the British bourgeoisie and as such is suited only to serve their interest. The Indian masses can have no use from such a machinery at all. An establishment of a new State suited to and standing for the quiet masses of the Workers and Peasants will essentially mean the smashing up of the present State, and the party of the working class can accomplish this."

While asserting that the Communist Party of India was not formally affiliated to the Communist International he said: "The Party accepted the tasks laid down by the Comintern, though it was not formally affiliated to it." Among these tasks are (1) the complete independence of India by the violent overthrow of British Rule and (2) the establishment of a Soviet Government.

[The judgment proceeded to deal with the cases of the other accused persons in the first group. As their cases are similar to the preceding ones, they are not set forth here *in extenso*. A few extracts only are set forth below.]

No. 4, *Joglekar*—Joglekar accused was an active member of the Communist Party in India and took an active part in the foundation of the Workers and Peasants' Party of Bombay and in the first conference of the All India Workers and Peasants' Party. He was elected a member of the executive committee of the Communist Party of India.

In his statement in court the accused stated: "The strikes are the military training colleges of the workers; they are the schools wherein the proletariat is prepared for its entry into the great struggle which is inevitable." While admitting that the general strike, as contemplated by communists, is preparatory to insurrection, he endeavoured to suggest that immediate insurrection was not in contemplation and said:

"It is only when there exists an objectively revolutionary situation that a Communist is called upon to give a call to the working class to join issue directly for a revolutionary overthrow of the social forces of imperialism."

"There is no doubt that a communist is an uncompromising enemy of capitalism and I make no secret of it that if and when objective forces do ripen I shall not hesitate to strike the blow that will lay all forces of capitalism and imperialism completely prostrate."

He, however, qualified it by saying that it was not the intention of raising immediately the standard of revolt. He also says that according to the communist view there is certainly very close connection between revolution and a general strike: "No revolution can be successful unless it is backed up and fortified by a general strike paralysing the entire machinery of the bourgeoisie, consisting of telegraphs, telephones, transport, press, banks, military and the police." He says: "And as the way to socialist revolution lies through a national revolution, as a communist I undoubtedly work for, and the Communist Party of India also works for, national revolution."

No. 6, *Mirajkar*—* * * In his statement before the court he said:

"I frankly admit that I am out to destroy the sovereignty of Capital—call it 'His Majesty's sovereignty' if you please, or whatever else you like."

"The revolutionary experience of the working class and the peasantry of Russia is the common heritage of the workers of the world. It teaches them methods and tactics of dealing with their oppressors—of ushering in an era of a new society. . . Most certainly we are pledged to overthrow the rule of British Imperialism in India."

As to the All India Workers and Peasants' Party he said:

"It has been already pointed out to the court that the Workers and Peasants' Party was a party inaugurated with a view to establish national independence through revolution."

No. 8, *Sohan Singh Josh*—* * * As president of the All India Workers and Peasants' Party Conference at Calcutta he said:

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"We are out not to end imperialism, but empire as well . . . India will get true freedom only when the British interests are cleared away bag and baggage . . . India can attain true liberty only through a revolution and not by framing constitutions. Our Party is carrying on an uncompromising campaign for complete independence . . . All people who believe in revolution and class struggle should join our party and, placing before the Workers and Peasants the revolutionary programme, should organise them to win freedom."

Referring to the "Coming War" between Russia and Great Britain he said:

"As soon as the war begins we should resort to mass strikes, sabotage and *hartals* and boycott, and by paralysing the means of transport, harass the enemy in the rear . . . Therefore, when the enemy is busy anywhere we should adopt such tactics as will put him between two fires. The Workers and Peasants should not hesitate to make any sacrifice at that time, because that will be the opportune time to destroy British Imperialism."

No. 12, *Shams-ul-Huda*—* * * In his statement in court Shams-ul-Huda said:

"Communists scorn to hide their views and aims; they openly declare that their purposes can only be achieved by the forcible overthrow of the whole extant social order . . . I am a communist and I stand by the Communist Party of India."

"Freedom from British Imperialism is not the ultimate aim of the Communist Party but the immediate aim. The ultimate aim of the Communists all over the world is the aim of the Communist International."

"If India wants to be free from British Imperialism like Czarism in Russia, the Indian worker has to be taught experience of Russian revolution in order to overthrow the barbarian Government in India."

The Second Group

The second group of persons consists of Spratt and Bradley. They are not members of the Communist Party of India but they are members of the Communist Party of Great Britain. The statutes and the rules of the Communist Party of Great Britain have

been printed and are to be found in P. 2399. The genuineness of this document is accepted on behalf of the accused. The very first rule lays down that the Communist Party of Great Britain is a section of the Communist International, and is bound by its decisions. The second rule enjoins that all members must accept the programme of the statutes of the Party and that every such member shall place his whole time and strength, in so far as he can himself dispose of them under existing conditions, at the disposal of the Party, and all members must carry out the decisions of the Party Lead.

Being a section of the Communist International and being bound by its decisions, the Communist Party of Great Britain has undoubtedly adopted the full programme of the Communist International and is bound to carry it out. In this way the entire programme of the Communist International is enjoined upon and has been adopted by the Communist Party of Great Britain. Important extracts from that programme have already been quoted. It follows that the accused Spratt and Bradley adhere to this programme in the same way and to the same extent, if not to a greater extent, as those accused who are members of the Communist Party of India. And therefore, all that we have said with regard to the former applies with equal force to the latter.

There is equally no doubt that the accused Spratt and Bradley were sent out by the Communist Party of Great Britain to India to carry out that programme. There is also no doubt that they carried on their activities in India and formed various organisations in furtherance of that programme. By making speeches, writing articles, communicating their doctrines and preaching their views and establishing organisations and making them more effective, they have taken a prominent and leading part in the carrying out of the programme of

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the Communist International in India. Obviously they are not mere theorists or arm-chair professors. They are active and enthusiastic workers in the cause which they advocate and they have undoubtedly come out to this country for active participation in the carrying out of the programme laid down by the Communist Party of Great Britain, which, as pointed out above, is identical with the programme accepted and adopted by the Communist Party of India. In this view, we see no essential difference between the case of these accused and that of the other accused who are members of the Indian Party. The position, in our opinion, of all these is the same and on the evidence before us there is no doubt that the offence of conspiring to deprive the Sovereign for the time being of Great Britain of his sovereignty of British India has been established. Their convictions also are quite proper.

The activities of these two accused are in point of fact not really disputed and they may be briefly summarised as follows:

No. 1, *Spratt*—Spratt is admittedly a member of the Communist Party of Great Britain. There is a mass of evidence to show that he was sent out by this Communist Party to India to work as an agent in order to carry out the policy and the programme of the Communist International. There can also be no doubt that throughout the period of his stay in India he was actively busy in the furtherance of this object. The learned Sessions Judge has traced his whole career during his stay in India, but we do not think it necessary to do so. It is clear that he was the moving spirit in organising Workers and Peasants' Parties in India and in giving a lead to the other Communists. It is proved that large sums of money used to be received by him from England and his explanation of the source of this money is not satisfactory. Some of his letters seem to suggest that what he was receiving was in the

nature of salary. He visited many towns in India and met Communists. His close association with the other accused, particularly some of the members of the Communist Party of India, is well established. Numerous documents were recovered from his possession at the time of his arrest. He took a leading part in the organisation of the Young Comrades League, though it ultimately failed. He was present at the "Council of War" at Bombay at which there was a consultation among the members of the Party. He also attended the All India Trade Union Conference at Jharia and the All India Workers and Peasants' Party Conference at Calcutta. That he threw himself whole-heartedly into Indian Communist politics is shown by his taking part in demonstrations and in the Lenin Day Meeting.

There are over 150 documents in the accused's own handwriting which show his various activities. He made several speeches preaching the doctrines of communism but it is not necessary to quote from them. In his statement in court he said :

"I did what I could to carry out that policy in the name of the British Working-class and in the Communist Party by co-operating with what I thought was the only body actively and effectively working for the national revolution in India at that time, that is, the Workers and Peasants' Party."

As regards the use of force he said :

"The correct attitude is to say that even if we cannot use force very effectively now and it is therefore usual, though not always wiser, not to try it, it is one of our principal duties to see that this situation does not continue and that we are as soon as possible in a position to use force effectively."

"The Magistrate has quoted one of my speeches in which I said something about the brutal and violent side of our policy. I have nothing to retract from that. We admit that we shall have to use violence."

"It seems to be a matter of common sense to conclude that if we are going to get rid of this régime—it must be done by violence."

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It seems to us that both Spratt and Bradley, being members of the Communist Party of Great Britain and professed communists, were sent out to India for the express purpose of carrying out the programme laid down for communists by the Communist International. They admit having been in close association with the members of the Communist Party of India and to have taken part in various activities which are part of the programme of the Communist International. It is therefore quite clear that the charge of having conspired with the other accused to deprive the King-Emperor of his sovereignty of British India is fully established

The Third Group

The third group consists of six communists, namely, Goswami, P. C. Joshi, Chakravarti, Basak, Hutchinson and Mittra.

All these accused are professed communists. They have made no secret of believing in the doctrines of communism with all its implications. Not being members of any Communist Party, and therefore not having in express terms subscribed to the programme of the Third Communist International, they are not in one sense bound to carry out that programme to the dictation of Moscow but they agree in principle and theory. In this respect their case stands on a slightly different footing from that of the communists who are members of the Communist Party of India or of England.

The mere holding of communist beliefs or doctrines is not punishable *per se*. A theoretical communist or a student of communism cannot be said to be guilty of an offence. And if a communist were to work individually, in furtherance of his belief, he would not be guilty of conspiracy. The question before us is whether these non-member communists also conspired with the member communists to deprive His Majesty the King-Emperor of his sovereignty. That they have been associating with each other cannot be doubted for one moment and is in fact not disputed. That they have

chosen to put forward the same exposition of the communist doctrines in court is apparent from their subscribing to the joint statement made on their behalf by accused Nimbkar. They openly adhere to all the communist doctrines in all their grim details.

The question whether the charge of conspiracy has been established as against them is a matter of inference to be drawn from their beliefs, their associations and their activities as well as from the statements which they themselves have made before the sessions court individually.

We are not called upon to deduce an illegal conspiracy from a number of legal acts. What we are called upon to decide is whether the conduct of the accused and the acts done by them, even though legal when taken separately, do not establish in point of fact the prosecution case that they had conspired with the member communists. The question is primarily one of fact and has to be decided on weighing the evidence both direct and circumstantial. When the beliefs are identical, and the association of all these accused with each other is established, it does not require very much evidence to convince us that such a conspiracy existed. But the position is made still clearer, for the accused themselves, not only in the joint statement made on their behalf by Nimbkar but also in their own separate statements in court, have admitted that they have been working in concert for the attainment of the common object.

It will be now convenient to take up first the individual cases of the six communists who were not members of the Communist Party of India.

[After considering the case of each of the individuals on the evidence the following conclusions were arrived at.]

No. 1, *Goswami*—* * * We have no doubt that Goswami, a professed communist, entertaining the views he did, was acting in concert with the workers of the Communist Party when he took part in the various activities

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described above. Some of those activities, when taken by themselves, might not be illegal, but they were certainly in pursuance of the programme laid down by the conspirators. In our opinion there is ample evidence to justify the conclusion that Goswami accused was a member of the conspiracy.

No. 2, *P. C. Joshi*—* * * We have quoted enough to show the doctrines which he advocates. His association with the members of the Communist Party of India and his activities in carrying on work in pursuance of the Communist programme are sufficient to justify the conclusion that he was not only a communist by conviction but that in agreement with the other conspirators he took an active part in prosecuting its aims and objects and working out its programme as best he could.

[The same conclusion was arrived at in respect of *No.* 3, *Chakravarti* and *No.* 4, *Basak.*]

No. 5, *Hutchinson*—Hutchinson is undoubtedly a communist. He is the only accused who was not arrested at first. He was taken into custody in June, 1929, and was prosecuted under a supplementary complaint. He arrived in India in September, 1928. It is admitted that he did not become a member of the Communist Party of India or of any of the Workers and Peasants' Parties, but at Bombay he started a study circle which consisted of about half a dozen members. The society was called the Circle of Progressive Youth. The members had fanciful names like Fraternity, Equality, Liberty, Solidarity and Sagacity. Hutchinson had the pseudonym of Tenacity. There is not the least doubt that in this circle the principles of communism were discussed and communist literature was circulated among the members. The forming of such a circle of study is somewhat suspicious, but Hutchinson does not appear to have done anything else, except to have made some speeches which

we shall consider later. * * * But apart from taking part in the work of the study circle, Hutchinson did not join in the activities of any other body or organisation.

* * * * *

He, however, made several speeches in which he used very strong language against the Government and the present order of society; some of the passages in this speech were highly seditious. They did not, however, amount to any incitement to the use of violence nor advocated any uprising; they dealt mostly with the international situation as it existed according to the point of view of Hutchinson, and they also dealt with the position of India as an international ally. * * *

We have very carefully considered the case against him and although we have no doubt that there are many suspicious circumstances which suggest that he might have been in conspiracy with the other accused, we feel that his activities were so limited that it would not be safe to convict him of the charge of conspiring to deprive His Majesty of the sovereignty of British India.

We must accordingly give him the benefit of the doubt and hold that the offence has not been established as against him.

No. 6, *Mittra*—Mittra accused was not a member of the Communist Party of India and not actually a member even of the All India Workers and Peasants' Party. He was therefore not a member of any organisation which may be characterised as communist. During the early part when his career came under notice he was a Congress worker.

* * * * *

Considerable reliance has been placed by the learned Sessions Judge on some of the speeches which he delivered during these strikes. But although the speeches may be highly seditious they rather go to show that he was not then a communist at all. The earlier speeches of May and June, 1928, do not necessarily show that

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he was a communist. Having regard to the speech which he made as late as January 20, 1929, we are inclined to think that it is not a fair assumption to make that he had become a confirmed communist before his arrest. No doubt he had come under the influence of Spratt and Goswami and others, and was imbibing some of their doctrines, but he does not seem to have been completely converted at that date.

The activities in which he was engaged amounted mostly to those of a Trade Union nature, and his presence at the one meeting of the All India Workers and Peasants' Conference does not establish that he deliberately joined a communist organisation. It may be noted that all the five assessors considered that the charge had not been brought home to Mittra. We think that his case also admits of considerable doubt. It is very difficult to record a finding on the evidence that prior to his arrest Mittra had become a wholehearted communist or had conspired with other communists to deprive His Majesty the King-Emperor of his sovereignty of British India. The acts committed by him fall short of establishing such a case.

The Fourth Group

The fourth group of accused consists of seven men who are not communists. They have undoubtedly been taking an active part in Trade Union movement. Not belonging to any party definitely committed by its constitution to adopting the programme of the Communist International, and not even believing in communism with its doctrine of the inevitable use of force, it is clear that they cannot be presumed to have entered into a conspiracy with the communist accused for depriving His Majesty the King-Emperor of his sovereignty of British India merely if they are proved to have taken part in Trade Union activities or to have made seditious speeches. It must be borne in mind that it is a

part of the communist programme to form communist fractions who enter into other non-communist organisations, like Workers and Peasants' Parties, Trade Unions etc., and try to influence the members and help in the dissemination of communist ideas. If such bodies are also open to non-communists, the mere fact of the association of non-communists with communist members would not, without cogent evidence, justify an inference that they had all conspired together for the purpose of depriving His Majesty of his sovereignty. Obviously in the case of such accused persons something more than taking part in non-communist Workers and Peasants' Parties and in Trade Unions, or making seditious speeches, would be required. On the other hand, it is also clear that if they were inciting people to violence, or to bring about a violent upheaval or revolution, and are found to be associating with professed communists and planning with them the furtherance of their own aims and objects and working out an agreed programme, they may well be held to be members of the conspiracy, even though they are not committed to the doctrines of communism.

We would now consider the cases of the seven non-communist accused persons separately:

No. 1, *Desai*—* * * We think that Desai's case is doubtful. He and his paper might well have been used by the communists for their own purposes; but it does not follow from this that Desai conspired with them to deprive His Majesty the King-Emperor of his sovereignty of British India. Whatever he did, however objectionable it may be otherwise, can well be explained by the fact that he was an extreme socialist and was advocating the cause of labour candidates and the labour movement. He was also upholding the rights of the working classes, though in highly intemperate language. We must accordingly give him the benefit of our doubt.

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No. 2, Jhabwala—* * * The case of Jhabwala has given us considerable anxiety and we have given it our best consideration. There are numerous points against him, but there seems to be one fundamental distinction between him and the professed communists. He has not advocated the use of violence in clear terms. There is no doubt that his association with some of the accused persons is established, but he was not considered to be a communist by his associates. He was utilised by them up to a point when he quarrelled and separated from them. As a socialist and Trade Unionist and taking part in public meetings as a leading worker he made some highly seditious speeches. He was in our opinion acting as a Trade Union leader and not as a communist. His appeal must be allowed. Four out of five assessors were in his favour.

[Similar conclusions were arrived at in the cases of *No. 3, Sehgal; No. 4, Alve; No. 5, Kasle; No. 6, Gauri Shankar* and *No. 7, Kadam.*]

We would now like to point out that the accused who are being acquitted have themselves largely to thank for their prosecution. Their seditious activities and association with communists created a natural suspicion that they were engaged in the conspiracy.

The evidence on the record shows that communists look upon the British Empire as the citadel of capitalism and the main obstacle to the progress of the proletarian revolution in the world. Possibly it was on this account that a determined attack was contemplated on India which was considered to be Britain's most vulnerable spot. We have no hesitation in saying that the Government were fully justified in starting this prosecution, which has resulted in a dangerous conspiracy being broken up.

It has been strenuously argued by counsel for the accused that Government had initiated this prosecution for the purpose of suppressing "opinions, ideas and

education''. This is a curious argument to advance on behalf of professed communists. It has been abundantly proved in this case that it is essential for the success of the ''Dictatorship of the Proletariat'' that all ideas and opinions contrary to orthodox communism must be sternly obliterated, together with those unfortunates who hold them. Further, that all those who are tainted with the bourgeois vices of humanity, sentiment or piety, and who might therefore object to this ''obliteration'' policy, cannot possibly be good communists, and that in the ''material'' home of the communists—''spiritual'' would not be the correct word—this policy is ruthlessly carried out.

It cannot be too clearly stated that in this case the Government has not prosecuted any one for his opinions. The gravamen of the charge—which as regards a large majority of the accused has been proved—is that the accused have endeavoured to put their opinions into practice; the inevitable result of their action is that they have brought themselves within the scope of section 121A of the Indian Penal Code.

It now remains to consider the question of sentences.

It may be said that the object aimed at in the conspiracy was impracticable,—one might as well say impossible of achievement. The steps taken by the accused till their arrest were in one sense utterly puerile and could not be conceived to lead to any such serious consequences as the accused dreamt of. But one reason why nothing substantial was done by the accused was the alertness and strict vigilance of the police, who were able to discover the conspiracy at an early stage and constantly watched the conduct of all the accused till their arrest. Even if there had been any chance of a partial success in rousing the peasants and workers, that was completely frustrated by the effective counteraction adopted by the highly efficient police. The detection of this conspiracy was a difficult matter, and

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it is very creditable to the Criminal Investigation Department that, in spite of every attempt having been made by the accused to conceal their designs and to cover up their communications and correspondence, the police managed to find out practically everything that the accused did or that passed between them.

When a seditious appeal is made to illiterate and ignorant workers and peasants, organised propaganda and work carried on among them, particularly during strikes, and when inflammatory speeches are made, it is not possible to look upon such conduct merely with contempt on the ground of its futility. Such a course of action might well lead to a serious general strike, a widespread breach of the public peace and bloodshed. We must therefore take a serious view of the offence of conspiracy committed by the accused whom we find guilty. In ordinary cases we would have no hesitation in inflicting long terms of imprisonment on the leading members of such a conspiracy.

But there is one circumstance in favour of the accused which cannot be ignored. The learned Sessions Judge was of course aware of it, but we have not been able to find any reference to it, and counsel for the parties have not been able to draw our attention to it anywhere in the judgment. He does not seem to have imposed the sentences on the accused after taking into account the outstanding fact that all of them, except Hutchinson, were arrested in March, 1929 (Hutchinson was arrested in June of that year), and that, but for the short periods during which only some of them have been admitted to bail, they have remained in jail for all this time. We have already commented upon the duration of the proceedings. No doubt that was due to various causes, but the fact remains that for all this period these accused have been in jail and have been under the strain of this lengthy trial. We feel that it is only just that this circumstance should be borne in mind

and the sentences, passed on the accused, reduced on that account. We further think that having regard to the limited scope within which the activities of the accused were confined, the scale of the sentences passed by the learned Sessions Judge is much too high.

As regards individual accused, we may say that the period during which Adhikari was in India before his arrest was very short. Ajudhia Prasad was a lascar who was used principally as the messenger for carrying letters to and from Spratt and Bradley. Spratt and Bradley accused came out to this country from England with the express purpose of carrying on their propaganda and have taken an active part in the various activities mentioned by us throughout their periods of stay in this country. But the sentences of transportation passed on them instead of penal servitude are illegal and contrary to the provisions of section 56 of the Indian Penal Code. Muzaffar Ahmad, Dange and Usmani were previously convicted in the Cawnpore conspiracy case and sentenced. The other accused, namely, Ghate, Joglekar, Nimbkar, Mirajkar, Sohan Singh Josh, Majid and Goswami, stand more or less on the same footing so far as the gravity of the offence committed is concerned. Chakravarti and Shams-ul-Huda stand lower in the scale.

After examining their cases and considering the reasons given by the learned Sessions Judge for the heavy sentences imposed by him upon them, we think that, having regard to all the circumstances of the case, it would meet the ends of justice to impose considerably reduced sentences.

It is commonplace to observe that the theory of punishment is based upon (*a*) the protection of the public, (*b*) the prevention of crime, and (*c*) the reformation of the offender. But even commonplaces require re-statement occasionally, as in practice these principles are sometimes forgotten.

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In the case of political offences arising out of the beliefs of the accused, severe sentences defeat their object. In practice such sentences confirm the offenders in their beliefs and create other offenders, thus increasing the evil and the danger to the public.

We are satisfied that the sentences imposed in this case by the trial court are calculated to defeat the purpose of punishment. We hope that the sentences we impose will have the opposite effect. If they do not, and the present offenders prove incorrigible, it may be necessary in the public interest to curtail their activities for lengthy periods.

We accordingly order that the appeals of Ajodhia Prasad, P. C. Joshi, Basak, Adhikari and Shams-ul-Huda be allowed to this extent that their convictions under section 121A of the Indian Penal Code be maintained but that their sentences be reduced to the terms already undergone by them. Consequently they will be released forthwith from jail.

As regards the appeals of Muzaffar Ahmad, Dange and Usmani, we order that they be allowed so far that their convictions under section 121A be maintained but their sentences be and are hereby reduced to 3 years' rigorous imprisonment each. They will accordingly serve out the remainder of their sentences in jail.

As regards the appeals of Ghate, Joglekar, Nimbkar, Bradley, Mirajkar, Sohan Singh Josh, Majid and Goswami, we allow them to this extent that we order their convictions under section 121A to be upheld, but we order that their sentences be reduced to one year's rigorous imprisonment each. They will accordingly serve out the balance of their sentences in jail.

As to the appeal of Spratt, we maintain his conviction under section 121A, but order his sentence to be reduced to 2 years' rigorous imprisonment.' He will

accordingly serve out the remainder of his sentence in jail.

As to the appeal of Chakravarti, we likewise partly allow it inasmuch as we order that his conviction under section 121A be maintained but as to his sentence we order it to be reduced to 7 months' rigorous imprisonment. He will accordingly complete his term of imprisonment in jail.

And lastly we order that the appeals of Desai, Hutchinson, Mittra, Jhabwala, Sehgal, Kasle, Gauri Shankar, Kadam and Alve be allowed, their convictions and sentences under section 121A be set aside and that they be set at liberty forthwith. The first eight persons being already on bail need not surrender. The last shall be released from jail.

The bail bonds of those who are not to surrender are hereby cancelled.

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ADVERSE POSSESSION—*Co-tenants—Auction purchaser of share of one co-tenant—Formal possession and mutation of names obtained by auction purchaser but not actual possession—Suit for possession against the other co-tenant—Limitation—Ouster*—Jus tertii.] *S. S.* and *S. L.* were the co-tenants of a fixed rate holding. The share of *S. L.* was sold in execution of a decree and formal possession was delivered to the auction purchaser in 1907. Failing to obtain actual possession, the auction purchaser sued *S. S.* for partition and possession in 1914; partition was refused and joint possession was decreed, and in execution again a formal delivery of possession was obtained, in 1915. A transferee from the auction purchaser got mutation of names effected in his favour in 1918. In the aforesaid proceedings *S. S.* throughout resisted and denied the title of the auction purchaser as well as his successor in title; and neither of them ever obtained actual possession. In 1928 the transferee brought a suit against *S. S.* for joint possession and mesne profits. The defendant pleaded that he and *S. L.* and *S. L.'s* sons had all along been in possession and that the suit was barred by adverse possession for over 12 years. *Held* that the suit was barred by limitation, time having begun to run from the delivery of formal possession in 1915.

Ordinarily the possession of one co-owner is in the eye of the law the possession of the others, and in order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster and the possession subsequent to that must be for the statutory period. In the present case there had been throughout an open denial of title and resistance to possession. So there had been an ouster, and the possession was adverse.

On the contention that the defendant's plea that he and *S. L.* were jointly in possession showed that he did not claim title in himself *qua S. L.'s* share and the setting up of *jus tertii* did not amount to adverse possession, it was *held* that the admission about the possession of *S. L.* could be of no avail to the plaintiff, as the possession of *S. L.* could not be deemed in law to be the possession of the plaintiff or his predecessor in title and was, in fact, adverse throughout.

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AGRA PRE-EMPTION ACT (LOCAL ACT XI OF 1922), SECTION 21—*Plaintiff with a higher right associating a co-plaintiff having an inferior right—Forfeiture of the superior right and relegation to the inferior right—Subsequent withdrawal of the co-plaintiff does not restore the superior right—"Class"—Agra Pre-emption Act (Local Act XI of 1922), section 12, sub-sections (1) and (3).*] Upon a sale made in favour of strangers to the mahal, a suit for pre-emption was brought by three persons: the first two plaintiffs, who had not only a right of pre-emption as co-sharers in the mahal but had also a superior right of pre-emption as being related to the vendor within four degrees and descended from a common ancestor, had associated with themselves in the suit the third plaintiff who had only the inferior right of pre-emption as a co-sharer. During the pendency of the suit the vendees acquired a share in the mahal, which put them on the same footing as co-sharers with the plaintiffs; and according to the law at that time the right of pre-emption based on co-sharership could no longer be enforced. Thereupon, the third plaintiff withdrew from the suit and the first two plaintiffs amended the plaint so as to base their claim on the superior right derived from their relationship with the vendor. *Held*, that the suit must fail; according to section 21 of the Agra Pre-emption Act, where a pre-emptor possessing a superior right sues jointly with a pre-emptor possessing an inferior right, he shall have no higher right than the person with whom he sues. Accordingly the superior right, based on relationship, possessed by the first two plaintiffs was altogether lost by their associating the third plaintiff in the suit and it could not revive by the subsequent withdrawal of the third plaintiff from the suit.

The principle underlying section 21 is that if a person possessing a superior right is not prepared to pre-empt the sale on payment of the whole price but finds it necessary to join with him a person who has an inferior right, so that they may share in the pre-emption money to be deposited, he by his conduct gives up his superior right and lowers himself to the status of the person whom he joins. Having done so, his superior right is altogether lost, and the mere fact that at some subsequent stage the person joined is prepared to withdraw would not suffice for restoring to the former his superior right.

The word "class" referred to in section 21 does not necessarily mean one of the five classes mentioned in sub-section (1) of section 12, but must also include relations who have a preferential claim under sub-section (3) of section 12.

Sheo Balak Chaudhuri *v.* Ram Saran Chaudhuri, I. L. R., 55 All. 975

AGRA TENANCY ACT (LOCAL ACT III OF 1926), SECTION 3(4)—*"Sayar"—Weighment dues—Agra Tenancy Act (III of 1926), section 267(2)—Reference to High Court—Procedure—Jurisdiction—Civil and revenue courts.*] Weighment dues,—i.e. money paid by the person who is licensed by the landholder or the lambardar to exercise his profession of weighing the goods of the tenants within the zamindari of the licensor and who in plying his profession uses the land of the zamindar and has, therefore, to pay this money for the license,—come within the definition of "sayar" in section 3(4) of the Agra Tenancy Act, and a suit for recovery of weighment dues is cognizable by the revenue court.

A suit to recover weighment dues was filed in a civil court, and the plaint was returned for presentation to the revenue court. It was then filed in the court of an Assistant Collector, who

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decreed the suit. On appeal the Collector was of opinion that the suit was not cognizable by the revenue court, and "allowed the appeal" without saying whether he dismissed the suit or directed the plaint to be returned. A revision was presented to the Commissioner to be forwarded to the Board of Revenue. Thereupon the Commissioner directed the Collector to make a reference to the High Court under section 267(2) of the Agra Tenancy Act, and a reference was made accordingly. *Held* that although the procedure adopted was not strictly justifiable by the letter of the law, yet in substance it was right, and the reference should be entertained.

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AGRA TENANCY ACT (LOCAL ACT III OF 1926), SECTIONS 3(11), 112 197 —*Grove-holder—Right to plant new trees in place of dead or fallen trees—"Improvement"—Interpretation of statutes.*] Under the Agra Tenancy Act of 1901, in the absence of a custom or contract to the contrary, a grove-holder had a right to plant new trees in place of those that had fallen down or been cut down, so long as the land retained its character of grove-land, and that right has not been taken away by anything in the new Act. Section 197 of the Act of 1926 does not purport to lay down the rights and liabilities of a grove-holder exhaustively. The right of a grove-holder to maintain the grove by replacing dead or fallen trees is an important incident of the status of grove-holder and the legislature cannot be held to have intended to take away this important right without express words to that effect.

A grove-holder according to the present Act is a tenant, presumably a non-occupancy tenant, and so under section 112 he is not entitled to make an improvement without the written consent of his landholder. But the replacing of dead or fallen trees by the planting of new trees amounts only to "mere repairs" and does not amount to an "improvement" within the meaning of section 3, clause (11). There is a substantial distinction between making a new plantation of trees and maintaining an old plantation.

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AGRA TENANCY ACT (LOCAL ACT III OF 1926), SECTION 226—*Suit for profits—"Co-sharer"—Mutwalli—Whether mutwalli can maintain suit for profits—Status of mutwalli in a private wakf.*] A certain village was wakf property, the plaintiff and the defendant being the two mutwallis, and the plaintiff's share as recorded in the khewat being one-third. In a suit for profits under the Agra Tenancy Act brought by the plaintiff against the defendant, who was the lambardar, it was objected that a mutwalli was not a "co-sharer" and could not bring such a suit.

Held, that a mutwalli was a "co-sharer" within the meaning of the Agra Tenancy Act, though he might not be a person having full proprietary interest in the share held by him. For the purposes of the Act a co-sharer is a person whose name is recorded in the khewat as a co-sharer and who is jointly and severally liable with other co-sharers for the land revenue and whose revenue is payable through the lambardar under section 144 of the Land Revenue Act. Any person whose name is recorded in the khewat as holding a share in the village is entitled to maintain a suit for profits, regardless of the fact whether or not he holds it as proprietor or as manager or mutwalli.

Per curiam—In the case of a private wakf a mutwalli holding the wakf property cannot be said to be a mere manager or superintendent, but is, practically speaking, the owner, with one limitation—that he cannot make a transfer; in every other respect his position is the same as that of an owner.

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AGRA TENANCY ACT (LOCAL ACT III OF 1926), SECTION 246—*Appeal—Third appeal to High Court lies— "Appellate decree".*] Under section 246 of the Agra Tenancy Act a third appeal can lie to the High Court from the decree of a District Judge passed in a second appeal from the decree of a Collector passed in appeal from a decree of an Assistant Collector, second class.

The expression "appellate decree" in that section would apply equally to a decree passed by the District Judge in first appeal or to a decree passed by him in second appeal. The language of this section is wide enough to authorize an appeal to the High Court from a decree passed by a District Judge in second appeal because such a decree would be an "appellate decree." The language of section 182 of the Tenancy Act of 1901 was different and provided for "second appeals" only. *Lachmi Narain v. Nirotam Das*, I. L. R., 29 All., 69, now obsolete.

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ARMS ACT (XI OF 1878), SECTION 19(*f*)—*"Possession"—Two loaded cartridges found in a corn bin—Whether the head of the family can be convicted thereupon.*] A house was searched and two loaded cartridges were found in a corn bin among ghee, butter and other articles. The Magistrate convicted the head of the family on the ground that as such he should be held responsible for the ammunition recovered from his house. It was *held* that in such a case it could not be said that the head of the house or any individual male member of the family was aware of the presence of these cartridges, and that in all such cases it was necessary to prove not only the presence of the article in the house but the possession of some particular person over that article in order to justify a conviction.

Emperor v. *Sikhdar*, I. L. R., 54 All., 411, dissented from.

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The rules relating to enrolment of Advocates, contained in chapter XV of the High Court Rules, show that a Barrister of England, as such, is not entitled to practise in these provinces, and it is only by virtue of his being enrolled as an Advocate of the High Court that he can do so. According to these rules, he can appear, plead and act in the High Court or any subordinate court; and there being no solicitors in these provinces he can see and receive instructions from, and act on behalf of, his clients; thus he combines in himself the capacities of a Barrister and a solicitor of England. In these circumstances there seems to be no valid reason why the disability attaching to a Barrister in England against settling and suing for his fees,—a disability based entirely on the usage and the peculiar constitution of the English Bar—, should be deemed to attach to a Barrister practising as an Advocate in these provinces.

When such a Barrister-Advocate is engaged for his professional services, he is engaged, and can perform his engagement, only in his capacity of an Advocate and not in that of a Barrister. Therefore, any incapacity to enter into a contract with his client for fees, which may attach to a Barrister as such, does not attach to him in his engagement as an Advocate, and such a contract is not void on the ground of incompetency under section 11 of the Contract Act. The legal incapacity, in this respect, of the Bar in England has become a rule of the common law of England; but the rules of the common law of England are not in force in this province; so, in this province, a Barrister cannot be said to be subject to any law which disqualifies him from contracting for his fees. Nor could such a rule be applied as being a "usage or custom of trade", referred to in section 1 of the Contract Act, for the profession of a Barrister is not a "trade". Such a contract is not one opposed to public policy and is not void under section 23. Also, if an express agreement or a tacit understanding that the Barrister-Advocate should not sue for his stipulated fee is sought to be set up, then such an agreement would be void under section 28 of the Act. The contract for fees, therefore, fulfils all the requirements of the Contract Act for a valid contract and is enforceable by law.

Smith v. *Guneshee Lal*, 3 N.-W. P. H. C. R., 83, and *Alston* v. *Pitambar Das*, I. L. R., 25 All., 509, overruled.

No inference adverse to the validity of a Barrister-Advocate's contract for fees for pleading only is to be drawn from the fact that the Legal Practitioners (Fees) Act, 1926, provides for the enforceability of a contract for fees of acting and does not mention pleading.

The Legal Practitioners (Fees) Act, 1926, seems to be applicable to criminal proceedings, no less than to civil proceedings, though the question is not free from doubt.

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CHRISTIAN MARRIAGE ACT (XV OF 1872), SECTIONS 4 AND 5—Marriage according to rules, rites and ceremonies of Church—"Rules of Church", meaning of 185

CIVIL PROCEDURE (AMENDMENT) ACT (XXVI OF 1920), SECTION 3, *See* Civil Procedure Code, order XLV, rule 7 432

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CIVIL PROCEDURE CODE, SECTION 47—Mode of enforcement of security bond filed by a party—Separate suit or execution 316

CIVIL PROCEDURE CODE, SECTION 47; ORDER XXI, RULE 97—*Transfer of Property Act (IV of 1882), section 52—Pendente lite transfer by mortgagor—Final decree for foreclosure—Decree executed against mortgagor for possession—Decree can be executed again against the transferee* pendente lite.] During the pendency of a suit for foreclosure the mortgagor defendant made a usufructuary mortgage to a stranger and then sold to him the equity of redemption. Subsequent to this the plaintiff applied for a final decree, impleading the transferee but later on discharging him. In execution of the final decree the plaintiff obtained delivery of possession against the mortgagor. Failing, however, in the mutation proceedings to get his name entered in place of that of the transferee, the plaintiff applied to execute his decree again, praying for delivery of possession as against the transferee.

Held that the rights of the decree-holder, namely to extinguish the right of redemption and to obtain possession of the mortgaged property, could not be affected by the transfers *pendente lite* and he was entitled to execute the final decree not only against the mortgagor but equally as against the transferee *pendente lite*. The execution taken out against the mortgagor turned out to be infructuous and was not a complete execution of the decree; so the decree-holder was entitled to maintain a second application for execution against the transferee and was not bound to come, nor did he profess to come, with an application under order XXI, rule 97 of the Civil Procedure Code. *Held*, also, that the controversy being between the decree-holder and a representative of the judgment-debtor, and being one relating to the execution of the decree, the matter was to be decided not by a separate suit but by the execution court under section 47 of the Civil Procedure Code.

Ram Charan *v.* Parmeshwari Din, I. L. R., 55 All. ... 235

CIVIL PROCEDURE CODE, SECTION 55(4)—*Release from arrest of judgment-debtor intending to apply for insolvency—Surety—Terms of security bond not in accordance with section—Discharge of surety according to actual terms of bond—Whether a nullity—Jurisdiction—Civil Procedure Code, section* 151.] A judgment-debtor was arrested in execution of a decree, but was released

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under section 55(4) of the Civil Procedure Code on his expressing an intention to apply for insolvency and on his furnishing a surety who filed a security bond undertaking that the petition in insolvency would be duly filed and that he would produce the judgment-debtor in court on the date to be fixed by the court. The petition in insolvency was filed within one month, and the judgment-debtor was produced in court on the date fixed; and the court passed an order staying execution proceedings pending the determination of the insolvency proceedings. Two days later, the surety applied for discharge on the ground that he had performed his obligations under the security bond, and after hearing both parties the court passed an order discharging the surety. The insolvency petition was eventually rejected, and thereupon the decree-holder applied that the surety be ordered to produce the judgment-debtor. As, however, the surety bond had been cancelled, the decree-holder applied that the order of cancellation be set aside under section 151 of the Civil Procedure Code by the exercise of the inherent jurisdiction of the court. This application was refused by the court, but was allowed by the lower appellate court.

Held that although the terms of the security bond might not have been in accordance with the provisions of section 55(4), yet the bond having been accepted as executed, the surety was entitled to stand upon its terms; and those terms having been carried out, the bond was rightly cancelled, though the insolvency proceedings had not terminated and further proceedings in execution might yet be taken. The order of cancellation was passed with jurisdiction and was not a nullity.

The order of cancellation could not be set aside under section 151 of the Civil Procedure Code. Though it was not appealable, the decree-holder had a remedy by way of revision, of which he did not avail himself. It is well established that where a party considers a decree or order of the court unjust and has neglected to avail himself of the remedy provided by the Civil Procedure Code, e.g. his right of appeal or of application in revision, it is not open to him subsequently to invite the court by virtue of its inherent jurisdiction reserved by section 151 to disturb that decree or order which he has failed to challenge in the statutory manner and within the statutory period.

Nageshar Prasad *v.* Gudrimal Narain Das, I. L. R., 55 All. 548

CIVIL PROCEDURE CODE, SECTION 60(1), PROVISO, CLAUSES (*i*) AND (*j*)—*Attachment of salary of a soldier-officer—Army Act (44 and 45 Vic., cap. 58), section 136—"Public officer".*] The salary of a soldier to whom the Army Act, 44 and 45 Victoria, chapter 58, applies is attachable in execution of a decree in accordance with the provisions of section 60(1) of the Civil Procedure Code; if he is a public officer as defined in section 2(17)(*c*) of the Civil Procedure Code, his salary is exempt from attachment to the extent mentioned in clause (*i*) of the proviso to section 60(1), and if he is not such a public officer, it is not exempt from attachment at all.

Section 136 of the Army Act, 44 and 45 Victoria, chapter 58, as amended in 1895, makes itself subject to Acts passed by the Governor-General of India in Council; it is, therefore, subject to the provisions of the Civil Procedure Code, section 60.

The proviso to section 60(1) only exempts certain properties, including part of the salary and allowances of public officers, from attachment. If a property, salary or otherwise, does not fall within any of the clauses of the proviso, the general provisions contained in section 60(1) shall prevail and the property shall be attachable.

Husain Bakhsh *v.* Briggen Shaw, I. L. R., 55 All. ... 648

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CIVIL PROCEDURE CODE, SECTIONS 63 AND 73—*Rateable distribution—Property attached by a superior as well as an inferior court—Sale by superior court—Application for rateable distribution made to the superior court without getting the decree transferred to it or applying for execution—Rateable distribution allowed.*] Assets were realised in the court of a Subordinate Judge by the sale of property which had been attached in execution of a decree of that court. Other persons, who held decrees of the Munsif's court, had also attached the same property in execution of their decrees, but under section 63 of the Civil Procedure Code the sale had to be held by the superior court, and they applied in the court of the Subordinate Judge, before assets had been realised, for a rateable distribution. They, however, had not got their decrees transferred to the court of the Subordinate Judge nor had they made any formal application for execution in that court. *Held* that the holders of the decrees of the inferior court were entitled, under section 73 read with section 63 of the Civil Procedure Code, to a rateable distribution without getting their decrees transferred to the superior court or formally applying for execution in that court.

Sarju Ram Sahu *v.* Partap Narain, I. L. R., 55 All. ... 622

CIVIL PROCEDURE CODE, SECTION 92—*Suit relating to public trust—Death of one of the two plaintiffs appellants pending appeal—No abatement of appeal.*] The death, during the pendency of an appeal, of one of the two plaintiffs appellants who instituted a suit under the provisions of section 92 of the Civil Procedure Code does not affect the maintainability of the appeal, although no person is brought on the record in place of the deceased plaintiff appellant.

Where the suit has been properly instituted according to section 92 of the Civil Procedure Code, there is nothing in that section which says that the suit cannot be continued if one of the original plaintiffs who instituted the suit in the manner laid down by law happens to die. *Raja Anand Rao* v. *Ramdas Daduram*, I. L. R., 48 Cal., 493, relied on; *Chhabile Ram* v. *Durga Prasad*, I. L. R., 37 All., 296, dissented from.

Ram Ghulam *v.* Shyam Sarup, I. L. R., 55 All. ... 687

CIVIL PROCEDURE CODE, SECTION 98(2)—*Difference of opinion among members composing a Bench—Decree to be varied so far as the members composing the Bench agree to vary it and confirmed as regards the rest—"Decree".*] In cases where the two Judges composing a Bench hearing an appeal are not unanimous, the decree appealed from should be varied to that extent to which the members composing the Bench agree that it should be varied and the rest of the decree should be confirmed.

Where the decree appealed from is the result of adjudications regarding several items, each adjudication is to be deemed a "decree" for the purpose of section 98(2) of the Civil Procedure Code and the provisions of that section should be applied with reference to the adjudication of each item.

Harakh Narain Singh *v.* Babban, I. L. R., 55 All. ... 672

CIVIL PROCEDURE CODE, SECTION 109(*c*)—"*Otherwise a fit case*"—*Letters Patent, paragraph 30—Appeal to Privy Council—Order suspending a pleader—Practice—Security for costs—Rules of High Court, chapter XVII, rule* 1(*b*).] An order of the High Court suspending a pleader from practising for a period of six months was sought to be taken in appeal to His Majesty in Council. *Held* that in view of the consistent practice of the Court in such cases leave to appeal may be granted, either under section 109(*c*) of the Civil Procedure Code or under paragraph 30 of the Letters Patent.

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As it appeared that several arguable points of law were raised in the proposed appeal and that the matter was of general public importance, the case was certified as being a fit one for appeal to His Majesty in Council.

Held, also, that security for costs was obligatory and in view of rule 1 *(b)* of chapter XVII of the High Court Rules the minimum amount to be furnished was Rs.4,000. Even if the application for leave was under paragraph 30 of the Letters Patent, the leave would be subject to the same rules as might be in force for filing appeals in general to His Majesty in Council.

The security was in this case permitted to be in immovable property.

In the matter of a Pleader, I. L. R., 55 All. ... 246

CIVIL PROCEDURE CODE, SECTION 115—"Case decided"—Application for leave to sue as pauper rejected on account of defective verification —Failure of court to call for amendment—Material irregularity in the exercise of jurisdiction 216

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CIVIL PROCEDURE CODE, SECTION 115—"Case decided"—Order demanding additional court-fee on plaint 274

CIVIL PROCEDURE CODE, SECTION 115—"Case decided"—Order granting amendment of plaint—No revision lies 169

CIVIL PROCEDURE CODE, SECTION 115—Other remedy available—Order demanding additional court-fee—Revision 274

CIVIL PROCEDURE CODE, SECTION 115—Revision from decision of election petition by the District Judge as election court, *See* District Boards Act, sections 18, 19, 20 1008

CIVIL PROCEDURE CODE, SECTION 115—Whether applicable to revision arising out of insolvency proceedings, See Provincial Insolvency Act, section 75 241

CIVIL PROCEDURE CODE, SECTION 115; ORDER VI, RULE 17—*Order refusing amendment of plaint—Revision—"Case decided"—Other remedy available.*] In a suit for money due on account of certain business transactions between the parties the defendant took a plea that some of the items claimed were barred by limitation. Thereupon the plaintiff applied to amend the plaint by introducing a reference to an acknowledgment which the plaintiff alleged had been made by the defendant. The Munsif refused to allow the amendment on the ground that the application was unduly delayed and that it would be unfair to the defendant to allow it. In revision from the order of refusal—

Held that the revision was maintainable. The effect of the order being definitely to shut out a part of the plaintiff's claim, the order was a final decision of the court on that part of the case and so could be brought within the meaning of the words "case decided" in section 115 of the Civil Procedure Code. Having regard to the provisions of order VI, rule 17, it was the duty of the court to have allowed the amendment, which was not one that would have altered the nature of the suit, in order to enable the questions in controversy between the parties to be determined once for all, and in refusing to allow the amendment it failed to exercise a jurisdiction vested in it by law.

The plaintiff had, no doubt, another remedy against the order of refusal, by way of a ground of appeal from the ultimate decree; but it could not be laid down as a general proposition that the High Court would not interfere in revision whenever there was another remedy open. Where the effect of allowing a revision, in a matter in which an appeal might also lie, will

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be a convenience to the parties and will save expense, the court will be inclined to interpret the provisions of section 115 liberally and to interfere with an order which has been passed without jurisdiction, or illegally or with material irregularity in the exercise of its jurisdiction.

Kishan Lal Babu Lal *v.* Ram Chandra, I. L. R., 55 All. 256

CIVIL PROCEDURE CODE, SECTION 132; ORDER V, RULES 3, 4—Pardanashin *lady—Cannot be compelled to attend court either as a party or as a witness.*] The exemption of *pardanashin* ladies from personal appearance in court, granted by section 132 of the Civil Procedure Code, is a right which no court has power to refuse, and applies to the parties as well as to witnesses. A *pardanashin* lady cannot be compelled to attend the court, either as a party under order V, rule 3 or 4 of the Civil Procedure Code, or as a witness.

The words "personal appearance" used in section 132 mean personal attendance. If a *pardanashin* lady observing strict *parda* is ordered to attend the court, it means that she is "compelled to appear in public". Her face may be covered or she may be wearing a *burka*, but all the same she is compelled to appear in public if she is ordered to attend the court. This is against the spirit of section 132.

Sundar Devi *v.* Datta Traya Narhar, I. L. R., 55 All. ... 666

CIVIL PROCEDURE CODE, SECTIONS 141, 151—*Decree transferred to another court for execution—Judgment-debtor's objection allowed* ex parte—*Executing court certifying full satisfaction to transferring court—Inherent jurisdiction of the executing court thereafter to set aside the* ex parte *order and restore the proceedings—Jurisdiction.*] A decree was transferred to another court for execution and in that court the judgment-debtor objected that the decree had been adjusted under a private arrangement. On the day of hearing the decree-holder was absent and the objection was allowed *ex parte* and the executing court certified to the court which had passed the decree that the decree had been fully satisfied and that the case was disposed of. An application for setting aside the *ex parte* order was subsequently made by the decree-holder to the executing court and was allowed, and the execution proceedings were restored.

Held, in revision, that the court to which the decree was sent for execution had inherent jurisdiction to entertain and allow an application for the setting aside of its previous order passed *ex parte*. Although the provisions of order IX of the Civil Procedure Code could not be made applicable to execution proceedings by calling in the aid of section 141 of the Code, yet an application to set aside its own previous *ex parte* order was entertainable by the court under the inherent jurisdiction which the court possessed and which was preserved by section 151.

Held, further, that this not being a case of a further execution of the decree, which could not be ordered after the certificate of satisfaction had been sent to the original court, but a question as to whether a previous proceeding of the executing court should or should not be re-opened, the executing court had not become *functus officio* but had jurisdiction to entertain such a question. Moreover, in the present case the decree-holder applied invoking the inherent jurisdiction of the court to set aside an *ex parte* order, to meet the ends of justice; and the proper court to entertain such an application was obviously the very court which had passed the *ex parte* order.

Muhammad Hanif *v.* Ali Raza, I. L. R., 55 All. ... 891

CIVIL PROCEDURE CODE, SECTIONS 144 AND 151—*Restitution—Sale in execution of simple money decree—Decree-holder purchaser—Rateable distribution amongst several decree-holders—Judgment-debtor's*

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title subsequently found invalid as the result of a separate suit—Application by decree-holder purchaser for restitution of amounts rateably distributed—Inherent power to order restitution—Caveat emptor, *doctrine of—Duty of courts to prevent injury by act of court.*] In execution of a simple money decree the judgment-debtor's shares in certain joint family properties were sold by auction, the decree-holder being the purchaser. At that time a decree for partition among the judgment-debtor's family, which had allotted most of these properties as the separate shares of other members of the family, was in existence and on its basis objections under section 47 of the Civil Procedure Code were raised and a suit was filed by these other members, but the objections and the suit were dismissed on the finding that the partition was fraudulent and collusive. After the sale the decree-holder purchaser had to pay out a part of the sale price to other decree-holders who were entitled to a rateable distribution. Subsequently the objections and the suit aforementioned were allowed on appeal, on the finding that the partition was valid, with the result that most of the properties already sold were exempted from the operation of the sale. The decree-holder auction purchaser then applied for restitution of a corresponding portion of the money which had been paid out in rateable distribution to the other decree-holders.

Held that, without deciding the question whether section 144 of the Civil Procedure Code applies only to those cases in which a decree is reversed or varied on appeal or revision and not to cases in which a decree is varied or set aside as the result of separate proceedings initiated for the purpose, or the question whether relief cannot be granted under that section in the cases of variations and reversals of orders as distinguished from decrees, it is clear that the court had power to grant the restitution in exercise of its inherent powers under section 151.

Section 144 does not exhaustively deal with the powers of courts to grant restitution, and the jurisdiction of a court to grant restitution in appropriate cases is not confined only to cases coming within the purview of that section but is inherent in the general jurisdiction of the court to pass an order for restitution, independently of the provisions of that section, with a view to secure complete justice between the parties concerned.

In the present case justice dictated that the restitution should be granted. At the time of the sale it was honestly believed by everybody that the properties sold belonged to the judgment-debtors, but subsequently events showed they had no saleable interest in some of the properties, with the result that the original fund, viz. the price fetched at the auction sale, that was rateably distributed between the several decree-holders was reduced in proportion to the value of these properties. This had the effect of reducing the amount to which each rival decree-holder was entitled on rateable distribution and the loss must, in the absence of any statutory provision to the contrary, be borne proportionately by all the decree-holders.

The doctrine of *caveat emptor* as applied to court sales discussed.

In the present case, having regard to the fact that the auction purchaser was the decree-holder himself, as well as to other circumstances, the doctrine of *caveat emptor* did not stand in the way of the restitution.

Further, the restitution was dictated by the duty cast upon courts to see that no act of the court does an injury to a suitor. Before the auction sale the question whether the judgment-debtors had any shares in the properties sought to be sold had actually been litigated and decided by the court and it was on the faith of that decision that the decree-holder made the auction purchase.

Amba Lal *v.* Ramgopal Madhoprasad, I. L. R., 55 All. ... 221

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CIVIL PROCEDURE CODE, SECTION 148; ORDER XLI, RULE 23—Conditional order of remand fixing a time for fulfilling the condition and in default the appeal to stand dismissed—Power to extend the time 326

CIVIL PROCEDURE CODE, SECTION 151—Abuse of process of the court—Order granting amendment of plaint, *See* Civil Procedure Code, order VI, rule 17 169

CIVIL PROCEDURE CODE, SECTION 151—Not applicable where the party has not availed himself of his remedy by appeal or revision ... 548

CIVIL PROCEDURE CODE, SECTION 151—Power of court to add or substitute parties, although the case may not be exactly covered by any specific provision of the Code 825

CIVIL PROCEDURE CODE, SECTIONS 151, 153; ORDER VI, RULE 15(2)—Duty of court to offer opportunity for amendment of defective verification, *See* Civil Procedure Code, order XXXIII, rules 2 and 5 216

CIVIL PROCEDURE CODE, ORDER I, RULES 1 AND 10—*Addition of parties—Representative suit—Withdrawal application—Right of other persons interested to intervene and maintain the suit—Suit by Collector on behalf of Hindu widow who had succeeded to her husband's estate (under Court of Wards) to contest an alleged adoption—Withdrawal of suit by Collector—Right of reversioner to be joined as a plaintiff and to continue the suit—Transposition of parties in revision—Court of Wards Act (Local Act IV of* 1912), *sections* 53, 55.] On behalf of two Hindu widows who had succeeded to their husband's estate, which was held under the Court of Wards, the Collector instituted a suit for a declaration that an alleged adoption set up by the principal defendant had not taken place and he had no title to the property, and for other reliefs against him and a transferee from him. Subsequently the Collector made an application withdrawing the suit; and this was opposed by the two widows as well as by a person who was, according to the plaint itself, the next reversioner and they asked to be made parties to the suit and to be allowed to continue it. The court allowed the Collector to withdraw the suit and dismissed it. The application of the others to be made parties was disallowed. The widows thereupon filed a revision in the High Court, making the reversioner a *pro forma* opposite party, who subsequently applied in the High Court to be transposed as an applicant for revision.

Held that the revision did not lie on behalf of the widows. The Collector having decided to withdraw the suit, his discretion could not, according to section 53 of the Court of Wards Act, be called in question by the civil court, and by virtue of section 55 of that Act the widows were unable, by themselves, to continue the suit. The lower court, in allowing the Collector to withdraw the suit and in rejecting the widows' application to continue it, could not be said to have acted illegally in the exercise of its jurisdiction, and no revision lay on their behalf. But the revision could be maintained at the instance of the reversioner, who had been impleaded as a party thereto, who was equally interested in it and who had applied to be transposed as an applicant; in such circumstances the fact that his application was a belated one did not stand in his way.

Where the plaintiff sues in a representative character it is not open to him to put an end to the litigation by merely withdrawing the suit. He may, no doubt, go out of the suit, but that does not put an end to the litigation where other people are interested in it and have a right to come in and continue the litigation.

The suit instituted by the Collector on behalf of the two widows who had succeeded to their husband's estate was a suit of a representative character, and the widows having only a limited

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estate the reversioner was also materially interested in the result of the suit. For the proper safeguarding of his interest the lower court should have allowed the reversioner to be added as a plaintiff before allowing the Collector to go out of the suit.

Although it might be that the provisions of order I, rule 10 of the Civil Procedure Code, or of any other rule, like order I, rule 1 of the Code, were not in terms applicable to the case, yet it was open to the court to allow the reversioner to be added as a plaintiff. Cases have arisen from time to time in which the provisions of the Civil Procedure Code have been found to be, in terms, inapplicable and yet parties have been added or substituted, where they ought to be added or substituted, on general principles.

Jaimala Kunwar *v.* Collector of Saharanpur, I. L. R., 55 All. 825

CIVIL PROCEDURE CODE, ORDER VI, RULE 15—Verification by unauthorised person does not nullify plaint—Curable ... 664

CIVIL PROCEDURE CODE, ORDER VI, RULE 17—*Amendment of plaint—Order granting amendment—Revision—"Case decided"—Civil Procedure Code, sections* 115, 151—*Abuse of process of the court.*] The plaintiff sued to recover a specified sum alleged to be due from the defendant as the result of three transactions in which the defendant was his comission agent. After the whole of the evidence in the suit had been recorded the plaintiff applied to amend the plaint so as to convert the suit into one for rendition of accounts. Against the order granting the application the defendant filed a revision. *Held* that the order allowing the plaint to be amended could not be deemed to be a "case decided" within the meaning of section 115 of the Civil Procedure Code and no revision lay.

Held also, that there was no abuse of the process of the court calling for interference under section 151 of the Code.

Dilsukh Rai Baijnath *v.* Dwarka Das, I. L. R., 55 All. 169

CIVIL PROCEDURE CODE, ORDER VIII, RULE 5—*Allegation in plaint "not admitted" in the written statement—Amounts to denial—Interpretation of statutes—Punctuation marks.*] Where a defendant states in the written statement that a certain allegation in the plaint is not admitted, the effect thereof, according to a correct interpretation of order VIII, rule 5 of the Civil Procedure Code, is a denial by the defendant of that allegation.

The placing of a comma after the word "implication" and before the word "or" in order VIII, rule 5 was, no doubt, unhappy, but punctuation marks cannot control the meaning of a statute. In construing a statute a court of law is bound to read it without the commas inserted in the print.

Mansa Ram *v.* Ancho, I. L. R., 55 All. 700

CIVIL PROCEDURE CODE, ORDER IX, RULES 3, 4—*Suit restored after dismissal for default—Notice of date of hearing of restored suit not given to defendant—Ex parte decree set aside for want of notice.*] A suit was dismissed for default of appearance of both parties. Notice of the plaintiff's application for restoration was served on the defendant but he did not appear at the hearing of the application. The application was granted and a date was fixed for hearing of the suit. The defendant had no knowledge of this date and did not appear, and the suit was decreed *ex parte*. *Held*, setting aside the *ex parte* decree, that the defendant was of right entitled to notice of the date of hearing of the suit after restoration, and the necessity to serve such notice was not obviated by the fact that the defendant had knowledge of the original hearing and of the application for restoration.

Mool Chand *v.* Ganga Sahai, I. L. R., 55 All. ... 684

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CIVIL PROCEDURE CODE, ORDER IX, RULE 13; ORDER XXXII, RULE 11 —*Minor defendant*—Ex parte *decree*—*Negligence and non-appearance of guardian* ad litem—*Remedy of minor*—*May apply for setting aside* ex parte *decree and removal of the guardian.*] A minor defendant, against whom an *ex parte* decree has been passed owing to the default and negligence of his guardian *ad litem*, may apply through another guardian or next friend for setting aside the *ex parte* decree under order IX, rule 13 of the Civil Procedure Code, and is not confined to the remedy of bringing a separate suit. The court can entertain an application on the ground of the negligence of the guardian, and can remove him and appoint another person as guardian *ad litem*.

Moti Chand *v.* Balram Das, I. L. R., 55 All. ... 136

CIVIL PROCEDURE CODE, ORDER XXI, RULE 2(1)—*Decree-holder certifying payment—No "application" involved—Application to take a step in aid of execution—Limitation Act (IX of 1908), article 182(5)—Application by judgment-debtor filing a letter of decree-holder agreeing to give time—Acknowledgment—Limitation Act (IX of 1908), section 19.*] The terms of order XXI, rule 2(1) of the Civil Pocedure Code involve no application, and the mere certification by the decree-holder of a payment of money under the decree is not an application to take some step in aid of execution of the decree within the meaning of article 182(5) of the Limitation Act, even if an "application", in the form of a petition, is made by the decree-holder certifying the payment. *Chote Singh* v. *Ishwari*, I. L. R., 32 All., 257, and *Lecky* v. *Bank of Upper India*, 8 A. L. J., 487, dissented from.

An application was made by a judgment-debtor praying that the letter attached thereto and written by the decree-holder, agreeing to give an extension of time to the judgment-debtor in respect of the money due under the decree, might be placed on the record. The application began by a reference to the number of the case and the names of the parties, describing them as decree-holder and judgment-debtor, respectively. *Held* that the application, by itself, amounted to an acknowledgment, within the meaning of section 19 of the Limitation Act, that the applicant was a judgment-debtor of the opposite party in the specified suit and that the decree was unsatisfied; and when read with the letter, a clear admission was added that the applicant owed money under the decree and had obtained time from the decree-holder for making further payment.

Adya Prasad Singh *v.* Lal Girjesh Bahadur, I. L. R., 55 All. 393

CIVIL PROCEDURE CODE, ORDER XXI, RULE 24(3)—Warrant of attachment executed after the date on which it was returnable—Attachment invalid 119

CIVIL PROCEDURE CODE, ORDER XXI, RULE 37—Simultaneous issue of notice and warrant—Warrant illegal 109

CIVIL PROCEDURE CODE, ORDER XXI, RULES 54, 67 AND 90—*Application for setting aside execution sale—Sale not proclaimed by beat of drum—Material irregularity.*] The law requires that an impending execution sale should be proclaimed by beat of drum or other customary mode, and failure to do so is a material irregularity. The addition of the words, "so far as may be", in order XXI, rule 67 of the Civil Procedure Code, 1908, does not make any change in the law in this respect in cases where it is possible to have a sale proclaimed by beat of drum.

Rajendra Behari Lal *v.* Gulzari Lal, I. L. R., 55 All. ... 182

CIVIL PROCEDURE CODE, ORDER XXI, RULE 63—*Claimant's suit to establish his title to attached property—Burden of proof*—Benami purchase—*Decree-holder's allegation that claimant is a* benamidar.] An ostensible owner of the property whose objection to

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attachment has been dismissed under order XXI, rule 58 of the Civil Procedure Code, and who therefore brings a suit under order XXI, rule 63, for establishment of his right, is not called upon to establish not only the due execution of the deed of conveyance by the original owner, but also that he was not the *benamidar* for the judgment-debtor as alleged by the decree-holder. The initial onus undoubtedly rests on the plaintiff and he has to establish his title to the property; but having established the due execution of the deed of conveyance by one who admittedly owned the property, the apparent tenor of the deed must prevail unless it is established by the defendant that the ostensible owner is only a *benamidar*. The fact that the plaintiff's objection under order XXI, rule 58, was dismissed does not add to the quantum of the onus resting on him.

V. E. A. R. M. Firm v. *Maung Ba Kyin*, A. I. R., 1927 P. C., 237, followed. *Nannhi Jan* v. *Bhuri*, I. L. R., 30 All., 321, considered overruled.

Abdus Sattar *v.* Hira Dei, I. L. R., 55 All. ... 266

CIVIL PROCEDURE CODE, ORDER XXI, RULES 66, 69, 90—*Execution sale of revenue paying property—Material irregularity—Properties sold not in their order as entered in sale officer's list—Hour of sale not specified in order adjourning sale—Adjournment obtained on judgment-debtor waiving a fresh proclamation—Estoppel—General Rules (Civil), volume II, Appendix 1(B)(1), rule 2—Undervaluation entered in proclamation of sale—Failure to object at that stage.*] In execution of a money decree two villages belonging to the judgment-debtor were attached, and were to be sold through the Collector. The decree-holder put certain valuations on these villages for entry in the proclamation of sale; and although notice under order XXI, rule 66(2) of the Civil Procedure Code was served on the judgment-debtor he did not question these valuations. The proclamation of sale mentioned the 20th of August, 1930, and 1 o'clock as the date and time fixed for the sale. Shortly before the date fixed the judgment-debtor applied for postponement of the sale, which was granted on the judgment-debtor's giving an undertaking that he waived his right to a fresh proclamation, and the court ordered that the sale be adjourned to the 24th of October, 1930; the order, however, did not specify the hour of sale. On the 24th of October, the Collector had 104 items of properties for sale under several decrees. Items 1 to 74 on the list were ancestral properties and items 75 to 104 were non-ancestral. The sale officer announced that he would sell the non-ancestral properties first; and the two villages in question, which were at serial No. 78, came to be sold at about 1 o'clock. The judgment-debtor applied under order XXI, rule 90 for setting aside the sale on the ground of material irregularity, and consequent loss, on the following counts, among others, (1) that his two villages were sold out of turn and not in the order in which properties for sale were entered in the list, (2) that the order postponing the sale did not specify the hour of sale, (3) that the value of the property as shown in the sale proclamation was grossly low, which misled the intending purchasers and resulted in the villages being sold for a very inadequate price.

Held, (1) In the absence of any rule fixing the order in which different properties ordered to be sold by different courts on the same day are to be sold, or any rule requiring that sales of properties should take place in the exact order in which they are entered in the list by the sale officer, there was no material irregularity in the sale officer's having taken up for sale the non-ancestral properties first. The sale officer's list of course contains all the sales which have been ordered to take place on that date, but there is no representation made that they would take place in the exact order in which they are entered in the list.

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(2) Order XXI, rule 69 no doubt prescribes that the order adjourning a sale should specify not only the date, but also the hour to which the sale is adjourned. In cases where properties other than landed properties are to be sold and sales take place on the spot, the specification of the exact hour is most important and an omission may be a serious irregularity, because it would not be possible for the purchasers to attend unless the time has been announced previously. But as regards landed properties, General Rules (Civil) volume II, Appendix I(B)(1), rule 2 lays down that the sale shall commence at noon at all seasons in all districts. There was, therefore, a definite rule in existence which laid down at what time the sale was to commence, and intending purchasers presumably knew the usual hour. Further, apart from this, the failure to mention the hour in the order, although it might be an irregularity, ceased to be a material irregularity when the judgment-debtor agreed that no proclamation or notice of the adjourned sale was to be issued.

(3) Undervaluation of the property in the proclamation of sale is, no doubt, a material and serious irregularity; but notice under order XXI, rule 66(2) was served on the judgment-debtor and any objection as to price should have been raised by him before the sale proclamation was drawn up. Not having raised any such objection he must be deemed to have waived it, and was estopped, upon general principles and particularly by the added proviso (*b*) to rule 90, from now raising the same ground and urging that the undervaluations were a material irregularity in the publication of the sale. Further, having chosen to waive his right to the issue of a fresh proclamation, he must be deemed to have waived his objection to the alleged irregularity of undervaluation in the previous sale proclamation. He could prove the real value in order to establish substantial loss, but not in order to establish material irregularity.

Babu Ram v. *Iman-ullah*, I. L. R., 49 All., 402, *Rup Kishore* v. *Collector of Etah*, I. L. R., 52 All., 115 and *Gulab Singh* v. *Raghubir Saran*, [1932] A. L. J., 357, distinguished.

Chhuttan Lal *v.* Muhammad Ikram Khan, I. L. R., 55 All. 519

CIVIL PROCEDURE CODE, ORDER XXI, RULE 89—*Payment to decree-holder, out of court, of amount entered in proclamation of sale—Deposit in court of five per cent. of purchase money—Valid compliance with requirements of the rule.*] Where a judgment-debtor, within thirty days of the auction sale, paid to the decree-holder out of court the sum entered in the proclamation of sale and deposited five per cent. of the purchase money in court for the auction purchaser, it was *held* that the conditions laid down in order XXI, rule 89 of the Civil Procedure Code were complied with and the sale was rightly set aside. The rule entitles the judgment-debtor to deduct the amount which has actually been received by the decree-holder since the date of proclamation, and there is nothing to restrict the scope of the rule to payments made before the sale.

In such a case it must be found that there was actual payment to the decree-holder; a mere compromise or admission of the decree-holder would not be sufficient.

Janki Prasad *v.* Lekhraj, I. L. R., 55 All. 697

CIVIL PROCEDURE CODE, ORDER XXI, RULE 89—*Several properties sold in separate lots to different purchasers in execution of same decree—Application for setting aside the sale of one item on deposit of its price and five per cent. thereof—Sale price of the other items not received by decree-holder at date of application—Deposit insufficient—Application not maintainable.*] Several items of

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mortgaged properties were sold in execution of a decree on the same day, but in separate lots and to different auction purchasers. The judgment-debtor applied under order XXI, rule 89 of the Civil Procedure Code for setting aside the sale of one item of property and deposited its sale price together with the penalty of five per cent. thereof. At that time the sales of the other items had not been confirmed, 30 days not having elapsed from the date of the sale, and the decree-holder had not received or even become entitled to receive the sale prices. In due course of time, however, those sales were confirmed.

Held that the application was not maintainable inasmuch as the deposit was insufficient for fulfilling the requirements of order XXI, rule 89 of the Civil Procedure Code. In order to avail himself of the provisions of that rule the judgment-debtor must bring himself strictly within its purview and must fulfil all the conditions required by it. Under that rule the whole of the decretal amount, as entered in the proclamation of sale, was to be deposited, less only such amount as might have been received since by the decree-holder; and the applicant could not claim deduction for the sale prices of the other items, as before confirmation of the sales the decree-holder could not be said to have received the amounts merely because they had been deposited to his credit.

Panna Lal v. *Bhola Nath*, I. L. R., 53 All., 152, disapproved.

Mannu Naik *v.* Mathura Prasad, I. L. R., 55 All. ... 123

CIVIL PROCEDURE CODE, ORDER XXI, RULE 89—*Whether deposit by judgment-debtor is tantamount to "receipt" by decree-holder—Auction purchaser, even if he is the decree-holder, is entitled to 5 per cent. of purchase money.*] When money has been deposited in court by the judgment-debtor for the decree-holder and that money is available to the decree-hoder without any obstacle of law, then that deposit amounts to receipt by the decree-holder within the meaning of order XXI, rule 89 of the Civil Procedure Code. So, where a sum of money had been deposited in court by the judgment-debtor towards the decretal amount before the auction sale, it was *held* that such sum could be taken into account to supplement the deposit actually made at the time of an application under order XXI, rule 89, by the judgment-debtor, in order to find out whether the requirements of that rule regarding the amount were complied with.

The auction purchaser is entitled to 5 per cent. of the purchase money under order XXI, rule 89, even where he is the decree-holder himself.

Ahmadi Begam *v.* Ishaq Muhammad, I. L. R., 55 All. ... 200

CIVIL PROCEDURE CODE, ORDER XXI, RULE 90—*Who can apply—"Whose interests are affected by the sale"—Not necessary that applicant must have interest in the property sold—Interest may be pecuniary.*] A decree directed that two items of property were to be sold first, and if the sale proceeds were insufficient to satisfy the decretal amount, then the third item of property was to be sold. The two items of property were sold, but they fetched only a small price. A mortgagee of the third property applied under order XXI, rule 90 of the Civil Procedure Code for setting aside the sale on the ground of fraud. *Held* that the applicant was a person whose interests were affected by the sale, within the meaning of order XXI, rule 90, and so he had a *locus standi* to apply. Although he had no direct interest in the property which was sold, yet his interests would be adversely affected by the sale if it was for an unduly small price, caused by fraud.

Shiam Lal *v.* Jaswant Singh, I. L. R., 55 All. ... 121

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CIVIL PROCEDURE CODE, ORDER XXII, RULES 8, 11, 12—*Applicability of rule 12 to execution appeal—Abatement of appeal—Appellant's insolvency—Refusal of receiver to give security for costs—Dismissal of appeal.*] Order XXII, rule 12 of the Civil Procedure Code does not exempt pending appeals from the operation of rule 8 of that order, even though the appeals arise out of execution proceedings. An appeal stands on quite a different footing, in this respect, from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution, then also rules 3, 4 and 8 would never apply.

So where in a pending appeal by the judgment-debtor against an order in execution the appellant became an insolvent, and the receiver refused to give the security for costs required under order XXII, rule 8(1), it was *held* that the appeal must be dismissed under rule 8(2).

Chhanga Mal *v.* Ram Dularey Lal, I. L. R., 55 All. ... 509

CIVIL PROCEDURE CODE, ORDER XXIII, RULE 1—Withdrawal of suit, *See* Representative suit 825

CIVIL PROCEDURE CODE, ORDER XXIII, RULE 3—*Compromise decree—"Lawful" compromise—Stipulation by way of a penalty contained in compromise—Contract Act (IX of 1872), section 74—Applicability to compromise decree—Civil Procedure Code, section 47—Execution court can modify penal clause contained in compromise decree.*] A decree was passed, in accordance with the terms of a compromise, which provided that the defendant was to pay Rs.11,500 by yearly instalments of Rs.1,100, but that in case of default in payment of any one instalment the entire amount remaining unpaid would become immediately payable, with interest at the rate of 2 per cent. per mensem from the date of the decree. Seven instalments were duly paid and then there was default. The decree-holder applied in execution to recover the balance, Rs.3,800, with interest at the stipulated rate from the date of the decree. The judgment-debtor objected that the stipulation as to the interest was of a penal nature, and the question was whether the court executing the decree could give any relief against it.

Held, by the Full Bench, that section 74 of the Contract Act applies to the case of a compromise decree and it is open to a court executing such decree to interfere with a stipulation by way of a penalty contained in the compromise. *Raghunandan Prasad* v. *Ghulam Ala-ud-din Beg*, I. L. R., 46 All., 571, overruled.

Per MUKERJI, A. C. J.—Section 74 of the Contract Act applies in terms to a contract, but, in the case of a compromise decree what there is before the court is a contract pure and simple. In passing a compromise decree the court does not exercise its judgment at all but merely embodies the terms of the agreement; and the decree does not cease to be a contract, for essentially it is a matter of contract and nothing else. Section 74 does not say that the relief to be granted under it is confined to a suit. Therefore, in executing the compromise decree, there is nothing in section 74 which prevents the court from applying that section to the case before it.

In entertaining a plea that one of the terms of the compromise contains a penal clause the court executing the decree does not really go behind the decree, but it finds out, as it is entitled to find out, on payment of what amount the decree should be discharged. If, instead of the amount of penal interest stipulated for, the court came to the conclusion that only a reasonable amount was to be paid, the court would be deciding a question as to the satisfaction or discharge of the decree under section 47 of the Civil Procedure Code, and would not be going against the terms of the decree.

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An agreement which contains a penal clause is not necessarily an unlawful compromise, and in the stipulation contained in the compromise in the present case there was nothing which made the compromise not "lawful" for the purpose of order XXIII, rule 3 of the Civil Procedure Code.

Per NIAMAT-ULLAH, J.—Section 74 of the Contract Act, viewed in its proper perspective, does not involve any interference with the decree when applied to a compromise on which a decree is passed. Parties to every contract containing a stipulation by way of penalty have rights and are subject to obligations mentioned in section 74, which are part and parcel of every such contract which should be deemed to include a proviso, imported by section 74, to the effect that the party complaining of the breach is entitled only to reasonable compensation not exceeding the penalty. Where such a contract is embodied in a compromise decree, the decree should be deemed to be giving effect to the compromise, with the legal incidents arising from section 74 regarding enforcement of the penal clause. The question of reasonable compensation will, therefore, arise when the compromise decree is sought to be enforced, and in determining such question the court executing the decree will not be going behind the decree, though seemingly it might appear to be doing so, but in reality will be giving effect to the decree in accordance with its real legal import.

Mohi-uddin *v.* Kashmiro Bibi, I. L. R., 55 All. ... 334

CIVIL PROCEDURE CODE, ORDER XXIII, RULE 3—*Compromise decree—"So far as it relates to the suit"—Part of the compromise going outside the subject matter of the suit—Decree incorporating and giving effect to the whole compromise—Validity of decree—Jurisdiction.*] A suit for dissolution of partnership was compromised, one of the terms being that the defendant was to pay a certain sum in instalments; and certain property specified in the compromise was to be deemed hypothecated for the due payment, in default of which the plaintiff might realise his money by sale of the property in execution of the compromise decree. A decree was passed incorporating and giving effect to the whole compromise. The compromise was not registered, nor attested as a mortgage deed would be. In execution of the decree the property was sold and the decree-holder purchased it. The question arose as to whether he had obtained a good title. *Held* that the decree was not one passed without jurisdiction and neither it nor the sale founded on it was a nullity, and the purchaser had got a good title.

So long as the compromise relates to the suit, the court has full authority under order XXIII, rule 3 of the Civil Procedure Code to pass a decree in terms of the compromise even though it might not have, strictly speaking, formed the subject matter of the suit.

No doubt it is the duty of the court, under order XXIII, rule 3, to see that although the whole of the compromise between the parties is recorded, the operative portion of the decree is confined to that part only which relates to the suit. A proper and effectual method of carrying out the terms of the rule would be for the decree to recite the whole of the agreement and then to conclude with an order embodying those matters which relate to the suit, or the agreement could be introduced in a schedule to the decree; but, in either case, although the operative part of the decree would be properly confined to the actual subject matter of the then existing litigation, the decree taken as a whole would include the agreement. But it does not necessarily follow that if the court does not strictly follow this direction, it is acting without jurisdiction.

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Even in cases where a part of the compromise does not, strictly speaking, relate to the suit and nevertheless the court decides that it relates to the suit and incorporates it into the operative portion and passes a decree in terms of it, the decree is not a nullity and not one passed without jurisdiction, but would be binding upon the parties to the decree and its validity cannot be questioned in the execution department, nor can any title derived under it be attacked.

The expression, "so far as it relates to the suit", in order XXIII, rule 3 is wider than the expression, "so far as relates to so much of the subject matter of the suit as is dealt with by the compromise", which occurred in section 375 of the former Code; and matters which may not, strictly speaking, be the subject matter of the suit itself as brought may yet "relate to the suit".

Sahu Shyam Lal *v.* Shyam Lal, I. L. R., 55 All. ... 775

CIVIL PROCEDURE CODE, ORDER XXX, RULES 1, 6—*Suit against a firm—Partner signing vakalatnama on behalf of firm—Written statement filed on behalf of firm—Sufficient to constitute appearance and contest by the partner—Civil Procedure Code, section 115—"Case decided"—Order debarring the partner from taking part in defending the suit.*] In a suit brought against a firm a written statement was filed on behalf of the firm by *K*, a partner, and a vakalatnama appointing advocates on behalf of the firm was signed by *J*, another partner. At a later stage of the suit *J* instructed another advocate to file an application on his behalf that *J* had not been impleaded in the suit, which was consequently defective and liable to dismissal. This application was dismissed by the court. The question was then raised whether *J* was entitled to take part in and conduct the defence of the suit, and the court passed an order that as *J* had not put in a written statement and contested the suit he could not now be entitled to take part in the defence by cross-examining the plaintiff's witnesses or producing defence witnesses. In revision from this order it was *held*—

Having regard to the provisions of rule 1(2) and rule 6 of order XXX of the Civil Procedure Code, the written statement signed and filed by one partner, *K*, should be considered to be the written statement of the firm, i.e. of all the partners constituting it, and *J* should, therefore, be considered to have contested the suit. Also, *J* had signed the vakalatnama of the advocates who appeared on behalf of the firm; and, at any rate, the authority conferred by him was effective so far as he was concerned, and *J* had, therefore, entered his appearance through counsel. Accordingly, *J* was entitled to take part in and conduct the defence of the suit.

The order debarring *J* from taking part in the conduct of the defence amounted to a "case decided" within the meaning of section 115 of the Civil Procedure Code, and in passing the order the lower court had acted illegally in the exercise of its jurisdiction, therefore a revision lay under section 115.

Parshotam Lal Jaitly *v.* Henley's Telegraph Works, I. L. R., 55 All. 719

CIVIL PROCEDURE CODE, ORDER XXXIII, RULES 2 AND 5—*Application for leave to sue as pauper—Verification defective—Civil Procedure Code, sections 151, 153; order VI, rule 15(2)—Duty of court to give opportunity for amendment of verification—Rejection of application without giving such opportunity—Abuse of the process of the court—Civil Procedure Code, section 115—Material irregularity in the exercise of jurisdiction—"Case decided."*] An application for leave to sue as a pauper was rejected under rule 5 of order XXXIII of the Civil Procedure Code on the ground that the

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requirements of rule 2 regarding verification were not complied with inasmuch as the verification was not in accordance with order VI, rule 15(2). *Held*, in revision,—

A revision lies from an order rejecting an application for leave to sue as a pauper.

Section 153 of the Civil Procedure Code says not only that the court may at any time amend any defect or error in any proceeding in a suit, but it further emphasises the duty of the court by saying that all necessary amendments shall be made for the purpose of determining the real question in issue. It was the duty of the court, when it found that a defect in verification was there, to offer an opportunity to the applicant to correct the verification. The court had failed to use the powers conferred on it by section 153, and this improper procedure, which had led to a denial of justice and frustrated the object for which the courts exist, amounted to material irregularity in the exercise of its jurisdiction within the meaning of section 115 and a revision was maintainable.

It would amount to an abuse of the process of the court within the meaning of section 151 of the Civil Procedure Code if the applicant had to make a fresh application for permission to sue as a pauper simply because his first application was rejected on the mere technicality that it was badly verified.

Piare Lal *v.* Bhagwan Das, I. L. R., 55 All. 216

CIVIL PROCEDURE CODE, ORDER XXXVII, RULE 5—Warrant of attachment before judgment not accompanied by notice to show cause or to furnish security—Warrant illegal, *See* Indian Penal Code, section 186 985

CIVIL PROCEDURE CODE, ORDER XXXVIII, RULE 5—*Attachment before judgment—Suit for sale on mortgage—Application for attachment made after the preliminary decree for sale but before the final decree—Application maintainable.*] The language of order XXXVIII, rule 5 of the Civil Procedure Code is very wide and an application for attachment before judgment can be made by a mortgagee decree-holder after the passing of the preliminary decree for sale and before the final decree, on the ground that the mortgaged property has much depreciated in value and that the defendant mortgagor is about to dispose of or remove his other property, so as to defeat the decree under order XXXIV, rule 6, which may ultimately be passed in the suit.

Muhammad Shafiq Ahmad *v.* Ram Katori, I. L. R., 55 All. 179

CIVIL PROCEDURE CODE, ORDER XXXIX, RULE 1—*Temporary injunction—Stay of execution of a decree by temporary injunction granted in another suit—Injunction granted on furnishing security hypothecating immovable property—Mode of enforcing security—Separate suit or execution—Civil Procedure Code, section 47.*] A final decree for sale on a mortgage was put in execution, and one *K* was impleaded as an heir to one of the judgment-debtors deceased. *K*, however, had a claim to certain items of the mortgaged property in her own right and she instituted a suit, against the decree-holder and others, for a declaration that the decree was not binding on her or on the items of property belonging to her. The suit was dismissed and *K* filed an appeal in the High Court. She applied in the High Court for an injunction, pending disposal of the appeal, restraining the decree-holder from executing his decree against her. The decree-holder objected that as part of the decretal amount did not carry any interest, he would suffer loss of interest if the sale were to be stayed. It was estimated that probably Rs.6,000 would be the amount of such interest up to the time when the appeal would come to be decided, and it was ordered that if *K*

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executed a security bond for Rs.6,000 to cover the loss of interest her application would be granted. *K* accordingly furnished the security bond, hypothecating immovable property, and execution of the decree was stayed by temporary injunction. *K's* appeal was eventually dismissed and the decree-holder then sought, in execution of the decree in *K's* suit, to realise the Rs.6,000 by sale of the property hypothecated in the security bond. The question arose whether the property could be brought to sale in this way or only upon a suit for sale thereof.

Held, that the remedy of the decree-holder was by a suit on the security bond and not by execution of a decree or order.

There was no decree or order which directed *K* to pay Rs.6,000 or any sum of money to him. The only decree in *K's* suit was one dismissing her suit and awarding costs to the opposite party. The order regarding the furnishing of security was not an executable order, but was of the nature of a declaratory order. As there was no decree or order capable of execution regarding the Rs.6,000, section 47 of the Civil Procedure Code had no application, and the remedy was by the institution of a suit for sale of the property hypothecated in the security bond.

Khair-un-nissa Bibi *v.* Oudh Commercial Bank, I. L. R., 55 All. 316

CIVIL PROCEDURE CODE, ORDER XLI, RULE 6(2)—*Appeal from preliminary decree for sale—No appeal filed from final decree—Application for execution of final decree may be stayed pending decision of the appeal from preliminary decree—"Such decree" includes the preliminary decree.*] During the pendency of an appeal from a preliminary decree for sale on a mortgage the final decree was passed and the decree-holder applied for execution, praying for sale of the properties. *Held* that the sale could be stayed, under order XLI, rule 6(2) of the Civil Procedure Code, until the disposal of the appeal. Although no appeal was pending from the final decree which was being executed, yet the sub-rule would apply, because if the appeal from the preliminary decree was allowed, not only that decree but also the final decree would be set aside.

A final decree is based on a preliminary decree and contains within itself the adjudication between the parties which has already been made in the preliminary decree, and to that extent an appeal against a preliminary decree is also by implication an appeal against a final decree, although it is not an appeal in express terms against a final decree.

Ram Katori *v.* Shafiq Ahmad, I. L. R., 55 All. ... 983

CIVIL PROCEDURE CODE, ORDER XLV, RULE 7—*Limitation and Civil Procedure (Amendment) Act (XXVI of 1920), section 3—Privy Council Rules, 1920, rule 9—Appeal to Privy Council—Deposit of translation etc. charges—Power to extend time beyond the statutory period for such deposit—Interpretation of statutes.*] *Held* (NIAMATULLAH, J., dissenting) that rule 9 of the Privy Council Rules, 1920, does not empower the Court to extend, beyond the limit fixed by order XLV, rule 7 of the Civil Procedure Code, the time for furnishing the security and depositing the translation etc. charges required by that rule in connection with an appeal to the Privy Council.

Per KING, J.—Even if an order allowing more time was intended to be included among the orders to be passed under rule 9 of the Privy Council Rules, 1920, it must be taken that it was intended that time could be allowed only in accordance with order XLV, rule 7. According to the maxim "*generalia specialibus non derogant*" the provisions of rule 9 of the Privy Council Rules could not, in the matter of allowing time, be deemed to override the provisions of order XLV, rule 7.

Bahadur Lal *v.* Judges of the High Court at Allahabad, I. L. R., 55 All. 482

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CIVIL PROCEDURE CODE, ORDER XLVII, RULE 1—*Review of judgment—Error of law whether ground for review—"Apparent on the face of the record."*] An application for review of judgment under order XLVII, rule 1 of the Civil Procedure Code does not lie on the ground of an error of law.

Even if it did, in the present case there was not any error of law so patent that it could be said to be apparent on the face of the record.

Bala Prasad *v.* Balkrishna, I. L. R., 55 All. 196

CIVIL PROCEDURE CODE, SCHEDULE II, PARAGRAPH 20—*Application for filing an award—Venue—"Court having jurisdiction over the subject-matter of the award"—Territorial jurisdiction.*] In order to decide whether the court, to which an application for filing an award under paragraph 20 of the second schedule of the Civil Procedure Code is made, has jurisdiction over the subject-matter of the award, it is necessary to consider the reliefs granted by the award and to determine whether the court would have jurisdiction to try a regular suit between the parties in which the reliefs claimed were the reliefs granted by the award.

It was agreed between a debtor and a creditor that the creditor should have a half share in a certain zamindari property of the debtor in lieu of his loan; but no conveyance was executed, and the debtor continued in possession of the entire property, paying a half share of the profits to the creditor. Disputes subsequently arose and were referred to arbitrators, the matters to be decided being (1) the question of accounts and (2) the question of transfer of the property. The award decided that the debtor was to pay a certain sum to the creditor to buy out the latter's half share, and until such payment was made the latter would remain owner of the share. An application to file the award was made in the court of the Subordinate Judge of Benares; the parties were residents of Benares, but the property was situate in Patna. *Held* that the court was not a court having jurisdiction over the subject-matter of the award. The award dealt with two points, one being the sum of money due in respect of the profits and the other relating to the transfer of the property. Only the first matter was within the jurisdiction of the court, but not the second. The court could not assume jurisdiction by ignoring and rejecting a portion of the award and the court was wrong in treating that portion as a nullity on the ground that there having been no conveyance in favour of the creditor, that portion of the award which declared his ownership was a nullity.

Upendra Nath Basu *v.* Het Lal, I. L. R., 55 All. ... 542

COMMON LAW—Barrister's capacity to sue for fees, *See* Barrister and client 570

COMPANIES ACT (VII OF 1913), SECTION 20—*Articles of association, alteration of—Increasing the number of directors provided for by the articles—Special resolution, whether necessary.*] One of the articles of association of a company provided as follows: "Until otherwise determined by a general meeting, the number of directors shall not be less than five, nor more than nine." By a resolution passed at a general meeting of the shareholders the number of directors was increased to 16. *Held* that the alteration was valid and no special resolution was required therefor. The right construction of the article was that it was open to the shareholders to vary the number of directors therein referred to without in any way necessitating an alteration in the article itself.

Gur Prasad Kapoor *v.* Rameshwar Prasad, I. L. R., 55 All. 399

COMPANIES ACT (VII OF 1913), SECTION 30—Subscribers of memorandum of association are members and not merely persons who have contracted to purchase shares 417

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COMPANIES ACT (VII OF 1913), SECTION 156—Deceased member is not a "past member" 417

COMPANIES ACT (VII OF 1913), SECTION 160—Contributories in case of death of a member—Extent of liability of Hindu sons as such contributories 417

COMPANIES ACT (VII OF 1913), SECTION 196—*Public examination of officers of company—Report of official liquidator—Specification of fraud—Sufficiency of material for prima facie case—Order made ex parte—Jurisdiction.*] Section 196 of the Companies Act, on the face of it, gives jurisdiction to a court to make an order for public examination immediately the official liquidator has applied to the court stating that in his opinion a fraud has been committed by any director or other officer of the company. It is, however, under the same section the duty of the court to consider the application with respect to the information contained in it. While the court must consider judicially the application of the official liquidator under section 196, and only pass an order for public examination on being satisfied that there is a *prima facie* case, i.e. reasonable ground for the allegation of fraud upon facts stated in the application, there is no necessity to specify the charge of fraud with the same particularity as would be necessary in a criminal charge under the Indian Penal Code. Once the official liquidator has made out any *prima facie* case of fraud against an officer, the examination is not to be confined to the particular fraud mentioned in the application.

The only objection which an officer of the company can make to an order of the court passed *ex parte* against him for his public examination is one of jurisdiction. He is not entitled at that stage to endeavour to show that the charge of fraud is incorrect. He may, of course, do so on his public examination if he can, and if he succeeds, then under section 196(6) the court may award him costs.

In re Indian States Bank, Ltd., I. L. R., 55 All. ... 496

COMPANIES ACT (VII OF 1913), SECTION 235—*Misfeasance by managing agents—Liquidator's application for taking misfeasance proceedings and ordering restoration—Limitation—*Terminus a quo*—Whether commencement of liquidation gives a fresh starting point—Limitation Act (IX of 1908), articles 36, 115, 116, 120.*] A company went into voluntary liquidation on the 12th of May, 1927, and the chairman of the board of directors was appointed as the liquidator. Later on, the High Court passed an order on the 5th of July, 1929, for a compulsory winding up by the Court, and an official liquidator was appointed. On the 28th of May, 1930, the official liquidator made an application under section 235 of the Companies Act, alleging various acts of misfeasance, misappropriation and negligence of duty against the managing agents of the company, and praying for an investigation into their conduct and for an order directing them to restore or contribute to the assets such sums as they might be found liable for. The question of limitation having arisen in connection with this application,—

Held by the Full Bench (MUKERJI, J., dissenting) that the winding up order does not give a fresh start either to a liquidator, or contributory or creditor for the purposes of limitation and that the relevant article of the Limitation Act, which would be appropriate according to the relief sought, would be applicable to the application under section 235 as if it were a suit brought for seeking the same relief on behalf of the company. *In the matter of Union Bank, Allahabad, Ltd.*, I. L. R., 47 All., 669 and *Official Liquidators, Jaunpur Sugar Factory* v. *Behari and Co.* (*See* I. L. R., 55 All., pp. 947—60), overruled.

Per SULAIMAN, C. J.—Section 235 of the Companies Act does not create any foundation upon which a claim for payment of money can be based; it creates no new rights. There is no absolute

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right in the persons named in that section to enforce the liability of the person complained against, or to recover anything for themselves; and the application is filed not for the purpose of enforcing any personal remedy or obtaining any exclusive benefit, but to draw the attention of the court to the matters complained against, with a view that the court may, in its discretion, start an inquiry and take steps under the section.

The power of the court to take proceedings and act under section 235 is purely discretionary and it may leave the applicant to seek his remedy by a regular suit, and it would readily take that course in case it is apparent that the procedure under that section, if continued, would deprive the opposite party of some defence or answer, e.g. by way of limitation, which would be open to him in a regular suit instituted by the person entitled to sue. Sub-section (3) of the section expressly makes provision for such defence on the ground of limitation.

The property of the company does not vest in the official liquidator; and whatever legal proceeding he takes, he does not take it in any personal right or capacity but must take it in the name and on behalf of the company. Similar considerations apply to the other persons entitled to make an application under section 235, and the application by a creditor or a contributory is obviously a representative application filed on behalf and for the benefit of a class of persons, and there is no right conferred by the section on either to start a fresh proceeding in his own right and for his own personal benefit.

If a new right had been created by section 235, only then there could have been a new start for the purposes of limitation. There is no fresh start for purposes of limitation necessarily beginning from the date of the liquidation proceedings.

What sub-section (3) of section 235 says is that the law of limitation applicable to an application under the section would be the same as if a suit were filed. It does not necessarily mean that such a suit was to be filed by the applicant in his own personal right. The appropriate article of the Limitation Act applicable to a suit of the nature of the relief claimed in the application would continue to be applicable. If a suit could have been brought by the company against the opposite party, then the article of the Limitation Act applicable to such a suit would continue to be applicable even if instead of filing a suit the liquidator files an application under section 235. It can not be laid down broadly that only article 120 would apply and that no other specific article can ever apply.

[*Per* MUKERJI, J.—Section 235 of the Companies Act can not be regarded as being only a provision prescribing a procedure,—a procedure in addition to the remedy which is open to the applicant by way of a suit. Though this may be the case with the liquidator, it is not the case with the creditor or the contributory, who also are entitled to apply under the section; a creditor or a contributory could not, independently of that section, bring a suit against the managing agent for alleged mismanagement or misfeasance. It is clear, therefore, that section 235 gives special rights which would not exist otherwise.

The expression that section 235 (or the corresponding section of the English Companies Act) "creates no new rights" has been used only in this sense that the section does not enable any of the applicants mentioned therein to recover anything for which no liability was created or incurred under the general law.

The proposition that where a suit by the company would be barred, an application by the liquidator under section 235 must be held to be barred, is not correct. A subsequent liquidator can proceed under the section against an earlier liquidator for misfeasance, although the company could not have brought a suit for

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similar relief, for the company ceased to be able to bring any suit by the time when the first liquidator was even appointed. Further, the significance of the words "such application" in sub-section (3) of section 235 should not be overlooked; these words can only mean an application by the creditor or contributory or liquidator. Therefore, the plaintiff of the "suit" mentioned in the sub-section for purposes of computing limitation must be the person who is the applicant under section 235, and not the company. The criterion for purposes of limitation is not a suit which could have been brought by the company, but a suit which could have been brought by the applicant under the section. It might be said that a suit by the liquidator would be a suit in the name and on behalf of the company; but a suit by a creditor or a contributory could not be said to be one on behalf of the company, as neither of them is entitled to bring such suit.

The date from which the limitation for an application under section 235 starts is the date of the winding up order. The only article of the Limitation Act applicable to an application like the one in the present case is article 120. Articles 36, 115 and 116 have no application to the case.]

Shiam Lal Diwan *v.* Official Liquidator, U. P. Oil Mills Co., I. L. R., 55 All. ... 912

COMPANIES ACT (VII OF 1913), SECTIONS 235, 280—*Misfeasance summons—Security for costs of opposite party—Public policy.*] A misfeasance proceeding under section 235 of the Companies Act is merely an examination by the court into the conduct of an officer of the company, and as a result of that examination the court may order the officer to restore the money or the property of the company, as the court may think just. Such proceedings cannot be said in any way to be "a suit or other legal proceeding" within the meaning of section 280 of the Act.

So, where the official liquidator applied for misfeasance proceedings against one of the original directors, it was *held* that the director was not entitled to demand security for his costs to be furnished by the official liquidator.

Any rule that the liquidator should furnish security for costs in such proceedings would also be opposed to public policy, as it would render it impossible for him to apply for such proceedings by reason of want of funds caused by the fraudulent misappropriation of the very persons sought to be proceeded against.

Liaqat Hussain *v.* Official Liquidator, I. L. R., 55 All. ... 250

COMPANY—*Lien on shares for debts due to company—Mortgage of shares—Managing Director mortgaging his shares—Notice—Mortgagee of shares not notifying company or getting himself registered as shareholder—Managing Director's knowledge whether notice to company—Principal and agent—Notice to agent.*] Where a company has a lien upon the shares of its members for debts owing by the members to itself, if a member pledges his shares to some third party as security for a loan, and the company has notice of the transaction, the company loses its lien for all debts owing by that member to the company subsequent to the knowledge of the company of the transaction.

Where the Managing Director of a company had peculiar and extensive powers given to him by the articles of association, so that he had the powers of the whole Board of Directors delegated to him, it was *held* that his knowledge of a transaction of pledge of shares was equivalent to the knowledge of the company. Further, he was in the position of agent of the company, and under the ordinary law of principal and agent notice to an agent was notice to the principal. So, when this Managing Director pledged his shares with his creditor, by handing over the share

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certificates together with a blank transfer, and the creditor neither notified the transaction to the company officially nor got himself registered as a shareholder, it was *held* that in the circumstances of this case the company had notice of the transaction.

In the matter of Union Indian Sugar Mills Co., Ltd., I. L. R., 55 All. 810

COMPANY, *See* under Companies Act.

COMPLAINT FILED BY UNAUTHORIZED PERSON—Trial *ultra vires*, *See* Municipalities Act, section 314 843

CONFESSION—Magistrate "recording" a confession already written out and signed by the person while under police control—Inadmissible in evidence 426

CONSENT—Age of consent for Christian marriage, *See* Divorce Act, section 7 243

CONSENT—Person of undeveloped mentality contracting a Christian marriage, *See* Divorce Act, section 19 185

CONSPIRACY, EVIDENCE AND PROOF OF, *See* Indian Penal Code, section 121A 1040

CONSTRUCTION OF DOCUMENT—Gift of immovable property to female—Absolute or life interest, *See* Hindu law 61

CONSTRUCTION OF DOCUMENT—Lease or license, *See* Stamp Act, section 2(16) and article 35(*a*)(iv) 874

CONTEMPT OF COURT—*Committed by pleader in his personal capacity as a party—Conviction for contempt of court—Whether disciplinary action can be taken against him professionally—Legal Practitioners Act (XVIII of 1879), section 12—Bar Councils Act (XXXVIII of 1926), section 10—Misconduct.*] A person, who was a pleader, committed gross contempt of court in his personal capacity as a party to a litigation, and was convicted and punished for the offence of contempt of court. *Held* that he could thereupon be dealt with, as a pleader, under section 12 of the Legal Practitioners Act.

An advocate or pleader may be punished professionally for gross contempt of court committed by him in his personal capacity. Section 10(1) of the Bar Councils Act clearly shows the intention of the legislature to render an advocate punishable in his professional capacity for misconduct other than professional misconduct.

In the matter of a Pleader, I. L. R., 55 All. 148

CONTINUING BREACH, *See* Municipalities Act, section 307 ... 603

CONTRACT ACT (IX OF 1872), SECTION 1—Usage of trade, *See* Barrister and client 570

CONTRACT ACT (IX OF 1872), SECTIONS 4, 5—Revocation of offer to abide by a special oath of the other party, *See* Oaths Act, sections 9, 11 298

CONTRACT ACT (IX OF 1872), SECTION 11—Capacity of Barrister to enter into and enforce contract for fees, *See* Barrister and client 570

CONTRACT ACT (IX OF 1872), SECTION 74—Applicability to compromise decree 334

CONTRIBUTORIES—Extent of liability of Hindu sons as contributories on death of a shareholder 417

CO-OWNERS—*Joint property in exclusive possession of some co-owners—Ouster—Suit by others for compensation for use and occupation—Whether maintainable without partition—Suit for share of profits of part only of joint property—Whether maintainable.*] A co-owner who is ousted and excluded from the enjoyment of his share in the property held by him and others as tenants-in-common is entitled to maintain a suit for compensation for use and occupation of his share from which he has been

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excluded by other co-owners. Also, one co-owner can sue another for his share of the profits which the latter has realised from some of the items of the joint property, and his only remedy is not a suit for partition. So *held* in a suit by one of three Muhammadan brothers, who jointly owned five houses besides other property, for compensation for use and occupation of two houses from which the plaintiff had been ousted and for his share of the rents realised by the defendants from the three other houses. The case, however, of co-sharers holding various parcels in joint zamindari, held by them as tenants-in-common, for the sake of convenience would stand on a different footing.

Where different co-sharers have, without force or fraud, been in peaceful and exclusive possession of different portions of joint properties for a time sufficient to raise the inference that their separate possessions originated in some mutual understanding, that arrangement cannot be disturbed either by a suit for joint possession or one for compensation for use and occupation; in such a case the only remedy left would be a suit for partition.

Muhammad Abdul Jalil Khan *v.* Muhammad Abdus Salam Khan, I. L. R., 55 All. 728

COPYRIGHT ACT (III OF 1914), SECTION 2(1), PROVISO (iv)—*Incorporation in school text-book of passages from several copyright works by the same author—Whether each poem in a book of poems by the same author is a separate "work" within the meaning of the proviso—Estoppel—Author acquiescing in infringement by some others—Civil Procedure Code, order VI, rule 15—Verification by unauthorised person.*] A suit regarding infringement of copyright was brought against the printer and publisher of a book named "Intermediate poems for detailed study, 1929". This book contained 14 poems, which had been recommended by the Board of Intermediate Education for study in schools for the Intermediate examination, together with paraphrases and notes. Four out of these fourteen were poems by Dr. Tagore, one being taken from his book "Gitanjali", two from his book "Gardener", and one from his book "Crescent Moon". The defendants claimed protection under section 2(1), proviso (iv) of the Copyright Act.

Held, that the defendants could not bring themselves within section 2(1), proviso (iv) of the Copyright Act, under which not more than two passages from works by the same author are permitted to be included in a compilation published for the use of schools. The proviso does not say that two passages from *each* work of the same author are permissible; what it permits is two passages in all from works by the same author. The question whether each poem in a volume of poems by one author is a separate "work" within the meaning of the proviso is not necessary to be decided in this case.

Held, also, that the fact that the author might have acquiesced in some other publishers having infringed his copyright by borrowing these very poems did not create any sort of estoppel against him.

Held, also, that verification of the plaint by a person who was not an authorised agent of the plaintiff was a mere irregularity which was in no way fatal to the institution of the suit; and any such irregularity was perfectly cured by a later verification by an authorised agent, which was made before the limitation had expired.

Educational Book Depot *v.* Rabindra Nath Tagore, I. L. R., 55 All. 564

COURT FEES ACT (VII OF 1870), SECTION 7(iv) (*c*); SCHEDULE II, ARTICLE 17(iii)—*Suit for declaration—Declaration that compromise decree is void and declaration of ownership and possession—*

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Consequential relief not asked for—Wrong order demanding additional court fee—Revision—Civil Procedure Code, section 115—"Case decided"—Other remedy available.] The plaintiff sued for a declaration that he was the owner in possession of a certain property. A further prayer was added for a declaration that a certain compromise decree, which had been passed against him in a former suit respecting that property, was obtained by fraud and therefore void and ineffectual against him. It was expressly stated that no consequential relief for the cancellation of the compromise decree was sought for. *Held* that as no consequential relief was prayed for, the court fee payable was Rs.20 for the two declarations, and an *ad valorem* court fee was not payable. *Kalu Ram* v. *Babu Lal*, I. L. R., 54 All., 812, distinguished.

Held, also, that a revision against the order of the Munsif demanding the payment of an *ad valorem* court fee on the plaint was maintainable. The determination of the question whether an additional court fee should be paid or not marked the termination of a definite stage of the suit and settled the controversy between the parties on the particular point. The order, therefore, amounted to a "case decided" within the meaning of section 115 of the Civil Procedure Code; and the order directing payment of an additional court fee was really an order declining to exercise the jurisdiction of entertaining the suit unless the payment was made. Further, on the question of there being another remedy open to the applicant, it was doubtful whether in all circumstances the applicant would have another remedy. If he paid the additional court fee and was successful in his suit and the other side did not appeal, the applicant would have no remedy for the excess payment, although he might fail to recover his costs from the defendant.

Lakshmi Narain Rai *v.* Dip Narain Rai, I. L. R., 55 All. 274

COURT FEES ACT (VII OF 1870), SECTION 7(v)(*b*) AND (*d*)—*Suit for possession of fractional shares of khewat khatas—"Estate"—Separate engagement for Government revenue—Court fee payable on market value—Government of India Notification No.* 1746, *under section* 35 *of Court Fees Act.*] A suit for possession of fractional shares of certain khewat holdings (khatas) of zamindari land is governed by section 7(v)(*d*), and not section 7(v)(*b*), of the Court Fees Act and the court fee payable is according to the market value of the fractional shares.

Although each khewat khata is, in accordance with section 67A of the Land Revenue Act and Board's Circular I-1, entered in the revenue records as being separately assessed with a definite portion of the revenue assessed upon the mahal, nevertheless it cannot be held to be an "estate" within the meaning of the Explanation to section 7(v) of the Court Fees Act, because no separate engagement has been entered into between Government and the proprietors in respect of the revenue assessed upon the khewat khata. And as the proprietors of the mahal have executed an engagement for the revenue assessed upon the mahal, of which the khewat khata is a part, it cannot be held that the khewat khata has been separately assessed with revenue "in the absence of such engagement".

Further, a khewat khata is not a "definite share" of an estate, within the meaning of section 7(v)(*b*), as it is not a "definite share" of the mahal; it follows that a fractional share of a khewat khata is not a "definite share" of an estate.

Under the Government of India Notification No. 1746, dated the 4th of April, 1889, issued in exercise of the powers conferred by section 35 of the Court Fees Act, the court fee in the present case would rightly have been calculated, under section 7(v)(*b*), upon five times the proportionate amount of

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revenue. But after the Devolution Act of 1920 the Notification in question has been superseded by the Local Government and is no longer in force.

A khewat khata is, no doubt, a "part of an estate" and it is recorded as separately assessed with revenue. So, in a suit for possession of an entire khewat khata the court fee would be payable under section 7(v)(*b*), upon five times the revenue assessed upon the khata.

Haliman *v.* Media, I. L. R., 55 All. 531

COURT FEES ACT (VII OF 1870), SCHEDULE II, ARTICLE 17(iii)—*Suit for a declaration that a certain decree is not binding on the plaintiff and is void and ineffectual—Cancellation not specifically prayed for—"Any other relief which may be just"—Whether consequential relief—Specific Relief Act (I of 1877), sections 39, 42.*] The plaintiff prayed for a declaration that a certain decree was not binding upon him and was altogether void and ineffectual; he also added the usual prayer that any other relief which in the opinion of the court might be deemed just might also be granted. *Held* that inasmuch as the plaintiff merely asked for a declaration that the previous decree was not binding on him and was altogether void and ineffectual, his suit was one for obtaining a declaratory decree only and fell under article 17(iii) of the second schedule of the Court Fees Act and the court fee payable was rupees ten only. As regards the other relief it was *held* that such a relief is unnecessarily added in most plaints and is not intended to mean anything more than reminding the court of its power to grant other reliefs even though not specifically asked for. The words of this relief were too vague and indefinite and no specific relief was referred to therein, and it could not be regarded as one which required the demand of an additional court fee or as one which, when coupled with the declaratory relief, changed the nature of the relief claimed in the suit.

Where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the court cannot call upon him to pay court fees on the consequential relief which he should have claimed although he has omitted to do so.

In the case of suits falling under section 39 of the Specific Relief Act it has, no doubt, been held that although the plaintiff may merely ask for the instrument to be declared void or voidable, without expressly asking for it to be delivered up and cancelled, nevertheless the suit is not one for obtaining a mere declaratory decree but one for obtaining a substantive relief. But the case of a decree stands on a different footing, because a suit to avoid it does not strictly fall under section 39 of the Specific Relief Act. If, however, the plaintiff chooses to ask for a definite relief for the cancellation or the setting aside of the decree, in addition to a declaration that it is not binding on him, he is professedly asking for something more than a mere declaratory decree.

Kalu Ram v. *Babu Lal*, I. L. R., 54 All., 812, explained and distinguished.

A suit for a mere declaration that a certain decree is not binding on the plaintiff does not, strictly speaking, fall within the scope of section 42 of the Specific Relief Act. But that section is not exhaustive so as to exclude all other forms of declaratory suits, and declaratory suits have been entertained and declarations granted by the Privy Council which, strictly speaking, did not fall within the purview of that section. Therefore, although the view can be taken that a suit like the present is not one merely for obtaining a declaratory decree but is essentially one for obtaining a more substantive relief amounting to frustration or cancellation of the decree, yet having regard

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to the fact that the Court Fees Act being a fiscal measure should be construed strictly and in favour of the subject, and to the long course of decisions in this court, the court fee of ten rupees should be held to be sufficient.

Sri Krishna Chandra v. Mahabir Prasad, I. L. R., 55 All. ... 791

COURT OF WARDS ACT (LOCAL ACT IV OF 1912), SECTIONS 53, 55—Suit by Collector, as Manager of Court of Wards, on behalf of Hindu widow to contest an alleged adoption—Application by Collector to withdraw suit—Right of reversioner to intervene and continue the suit 825

CRIMINAL PROCEDURE CODE, SECTIONS 1(2) AND 4(2)—Special law—Evidence Act not affected by Criminal Procedure Code, except where specifically provided in the Evidence Act 463

CRIMINAL PROCEDURE CODE, SECTIONS 15, 16, 350A—*Bench of Magistrates—Bench of three, with quorum of two—Trial begun before three, but heard throughout and decided by two—Validity.*] At the commencement of a trial all the three Magistrates constituting a Bench of Honorary Magistrates were present, but at some of the subsequent hearings one of them was absent. The other two Magistrates were present at all the hearings and it was they who delivered the judgment. According to the rules framed by the District Magistrate under section 16 of the Criminal Procedure Code, two Magistrates were to form a quorum, and the same two Magistrates must hear a particular case from start to finish and sign the judgment. *Held*, that the trial was valid. *Chiteshwar Dube* v. *King-Emperor*, [1932] A. L. J., 42, distinguished.

Emperor v. Mathura, I. L. R., 55 All. 459

CRIMINAL PROCEDURE CODE, SECTION 106—*Security for keeping the peace upon conviction for simple hurt—"Breach of the peace", not necessarily of the public peace—Simple hurt is an offence involving breach of the peace—Whether reasons for requiring security must be recorded.*] The words "assault or other offence involving a breach of the peace" in section 106 of the Criminal Procedure Code include the offence of causing hurt under section 323 of the Indian Penal Code, and a person convicted of that offence can be ordered to find security to keep the peace under section 106 of the Criminal Procedure Code.

A "breach of the peace" does not necessarily mean a breach of the public peace, and the offence of causing hurt to a person involves a breach of the peace, whether it takes place in a private room or in the open street. From the language of section 107 of the Criminal Procedure Code it appears that a "breach of the peace" is to be regarded as something distinct from a "disturbance of the public tranquillity".

Muhammad Rahim v. *Emperor*, 23 A. L. J., 1053, and *Emperor* v. *Atma Ram*, I. L. R., 49 All., 131, dissented from.

The law does not provide that the court acting under section 106 of the Criminal Procedure Code shall record its reasons for forming the opinion that it is necessary to take security in the case; but it is desirable for the court to do so in order that an appellate court may be in possession of the reasons if they are not apparent on the face of the record.

Emperor v. Naziruddin, I. L. R., 55 All. 850

CRIMINAL PROCEDURE CODE, SECTION 110—*Security for good behaviour—Same person run in a second time after release from imprisonment on the previous occasion—Evidence—Evidence in second case should relate to period subsequent to the release.*] In cases where there has been a previous proceeding under section 110 of the Criminal Procedure Code resulting in a term of imprisonment for the person proceeded against, and some time after his release fresh proceedings are taken against him under the same section, witnesses in the

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second proceedings ought to make it clear in their evidence that their evidence relates to the reputation of the person subsequent to his release from imprisonment. It would be intolerable that on the same evidence as before, suspected persons should continually be sent to jail under this section.

Emperor *v.* Niranjan Singh, I. L. R., 55 All. 404

CRIMINAL PROCEDURE CODE, SECTIONS 133, 139A—*Obstructing alleged public way—Owner of land putting up turnstiles thereon—Ownership* prima facie *evidence against existence of public right of way—Order to remove turnstiles passed without proof of right of way—Criminal Procedure Code, section 537—Irregularity of procedure—Prejudice.*] The owner of a plot of land having put up turnstiles obstructing a path across the land, certain persons who alleged that there was a public right of way over the path initiated proceedings under section 133 of the Criminal Procedure Code. Notice under that section was issued to the owner, who put in appearance under section 135(*b*) and filed a written statement and title deeds. A date was fixed for hearing evidence, but without hearing any evidence or arguments the Magistrate passed an order absolute under section 137 for the removal of the turnstiles, although he had not arrived at a definite decision as to the existence of a public right of way.

Held, in revision, that the procedure of the Magistrate was not according to law. After appearance was made by the owner, the next step which the Magistrate had to take was that set forth in section 139A, and the fact of ownership of the land undoubtedly provided "reliable evidence" within the meaning of clause (3) of that section in support of the denial of existence of a public right of way, in the absence of cogent evidence on the other side; accordingly the Magistrate was bound to stay the proceedings until the question should be decided by a competent civil court.

No doubt the jurisdiction of the criminal court to take proceedings under section 133 is not ousted by the mere fact that the person proceeded against is the owner of the land; but although the Magistrate had jurisdiction to initiate the proceedings, yet as he was betrayed by an error in procedure into coming to a decision which could only be pronounced properly by a civil court, the result undoubtedly did prejudice the present applicant, the owner; for the result was an order compelling the owner to remove the turnstiles set up on her own land, without any authoritative decision that she had been obstructing a public way. The irregularity in procedure could not, therefore, be cured under section 537 of the Criminal Procedure Code. The order of the Magistrate was *ultra vires*.

Ram Kali *v.* Kripa Shankar, I. L. R., 55 All. ... 866

CRIMINAL PROCEDURE CODE, SECTIONS 145(1), 537—*Omission of Magistrate to record the fact of or the grounds for his being satisfied that a dispute likely to cause a breach of peace exists—Subsequent proceedings not vitiated unless it has occasioned a failure of justice—Irregularity—Jurisdiction—Criminal Procedure Code, section* 148(3)—*Costs awarded by Magistrate by a subsequent order passed* ex parte—*Validity—Criminal Procedure Code, sections* 423(*d*) *and* 439—*Costs of revision proceedings—Authority to award such costs—"Consequential or incidental order".*] An application to take proceedings under section 145 of the Criminal Procedure Code was made to a Magistrate, who took the applicant's statement and called for a police report. On receipt of the police report he, being occupied with other work, transferred the case for disposal to another Magistrate, with the remark that judging from the police report there appeared to be some basis for the complaint. The Magistrate, to whom the case now came, perused

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the record and directed notice to issue to the opposite party according to law. Written statements were filed and evidence was recorded in due course, and the Magistrate ultimately passed an order directing the applicant to be put in possession of the disputed property and prohibiting the opposite party from interfering with it. Two days later, upon application by the applicant, the Magistrate passed an *ex parte* order awarding costs against the opposite party. *Held*, in revision—

Although the Magistrate who passed the order in the case did not strictly comply with the provisions of section 145(1) of the Code of Criminal Procedure inasmuch as he omitted to state in writing that he was satisfied that there was a likelihood of a breach of the peace and the grounds on which he was so satisfied, yet such omission did not deprive him of his jurisdiction but amounted only to an irregularity which was cured by section 537 of the Code, as no failure of justice was, in fact, occasioned by such omission. In the circumstances of the case there was every reason to believe, although the Magistrate did not expressly say so, that before he took any action he was satisfied in his mind, on a perusal of the police report and the sworn statement of the applicant, that there was a likelihood of a breach of the peace with respect to an immovable property.

The jurisdiction of a Magistrate to take action under section 145 of the Criminal Procedure Code arises from the fact that he has received certain information from which he is satisfied that there is a dispute likely to cause a breach of the peace. The jurisdiction of the Magistrate does not depend on how he proceeds. If he has jurisdiction, he is not deprived of jurisdiction merely because his procedure is erroneous or defective. His omission to follow certain directions contained in the Code cannot be said to deprive him of jurisdiction.

A distinction between an "illegality" and an "irregularity" should not be introduced, for the purpose of the application of section 537 of the Criminal Procedure Code. The sole criterion given by section 537 is whether the accused person has been prejudiced or not. *Subrahmania Ayyar* v. *King-Emperor*, I. L. R., 25 Mad., 61, discussed. *Banka Singh* v. *Gokul*, I. L. R., 49 All., 325, *Nathu Ram* v. *Emperor*, 15 A. L. J., 270, *Brahmanath* v. *Sundar Nath*, 17 A. L. J., 434, impliedly overruled.

The order as to costs of the proceedings before the Magistrate, which was passed by him two days after his passing the order deciding the case itself, was not an illegal order. Section 148(3) of the Criminal Procedure Code does not fix any limit of time for passing the order as to costs.

Although section 148(3) does not expressly state that a party should have an opportunity of being heard before an order for costs is passed against him, yet, in accordance with the ordinary principles of justice, the Magistrate should not have passed the order without giving such opportunity.

Section 423(*d*) of the Criminal Procedure Code read with section 439 does not authorise the High Court to award costs of proceedings in revision before it. Clause (*d*) of section 423 authorises the appellate court to make "any consequential or incidental order that may be just or proper", but these words mean such orders as follow from or are accessary to the order passed on the appeal, and do not mean that the appellate court may pass an order as to costs of the appeal itself.

Kapoor Chand *v.* Suraj Prasad, I. L. R., 55 All. ... 301

CRIMINAL PROCEDURE CODE, SECTION 148(3)—Costs awarded by Magistrate by a subsequent order and passed *ex parte*—Validity ... 301

CRIMINAL PROCEDURE CODE, SECTION 162—*Evidence Act (I of 1872), section 27—Statement by accused person to police officer—Part of statement relating to discovery of stolen articles—Admissibility*

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in evidence—Criminal Procedure Code, sections 1(2) and 4(2)—Special law—Evidence Act not affected by Criminal Procedure Code, except where specifically provided.] Section 162 of the Criminal Procedure Code, as amended by Act XVIII of 1923, does not alter the provisions of section 27 of the Evidence Act; and a statement, or part of a statement, made by an accused person to a police officer which is admissible in evidence by virtue of section 27 of the Evidence Act is not rendered inadmissible by the amended section 162 of the Criminal Procedure Code.

Section 162 is not intended to apply to statements made by accused persons, which are governed by section 164 and by sections 24 to 27 of the Evidence Act; there is, therefore, no contradiction between section 162 of the Criminal Procedure Code and section 27 of the Evidence Act. Further, by virtue of section 1(2) of the Criminal Procedure Code, any provision of the Evidence Act, which is a "special law" as defined by section 4 of the Code, cannot be affected by the Criminal Procedure Code in the absence of a specific provision to the contrary made in that Code, and there is no such specific provision modifying or altering section 27 of the Evidence Act.

Emperor *v.* Faujdar, I. L. R., 55 All.— 463

CRIMINAL PROCEDURE CODE, SECTION 162—"Refer to such writing"—Procedure explained 689

CRIMINAL PROCEDURE CODE, SECTION 163—*Statement of abducted girl, who had been taken to another town, recorded by the police of that town—Admissibility of such statement at the trial which was held where the abduction took place—Statement made in the course of an "investigation"—Criminal Procedure Code, sections 4(l), 156(1) and 181—Jurisdiction.*] A girl was abducted from her husband's house in the Moradabad district, and a report was made at police station Amroha in that district. About four months later she was seen in the company of one of the accused in Delhi, in suspicious circumstances; and a constable took them to a police station in Delhi and the sub-inspector recorded the statement of the girl. At the trial, which took place in the Moradabad district, this statement was adduced in evidence by the prosecution.

Held, that the statement was inadmissible in evidence under section 162 of the Criminal Procedure Code. It was a statement made to a police officer in the course of an investigation; for, according to the definition of "investigation" in section 4(l) of the Criminal Procedure Code it includes the collecting of evidence by a police officer. It cannot be said that the police officer at Delhi could not have been "investigating" in the present case as he had no jurisdiction to do so; for, he had such jurisdiction under section 156(1) of the Code, inasmuch as by section 181(4) the offence could be inquired into or tried by a court at Delhi where the abducted person had been conveyed or detained.

Emperor *v.* Khairati, I. L. R., 55 All. 979

CRIMINAL PROCEDURE CODE, SECTION 164—Extent of duty of a Magistrate recording a confession 91

CRIMINAL PROCEDURE CODE, SECTION 164—*Written confession—Magistrate accepting a confession already written out and signed by the person while under police control—Such confession inadmissible in evidence—"Record" a confession, meaning of.*] While an accused person was under the control of the police he wrote out a confession and signed it. He was thereafter taken before a Magistrate for recording his confession under section 164 of the Criminal Procedure Code. After the Magistrate had given him the usual warnings the accused person handed over the written confession to the Magistrate and said that whatever he had to say was contained therein.

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The written confession was then read over to the accused and he said it was correct and that he wanted to make no alteration in it. *Held* that the confession was not recorded as required by section 164 and was inadmissible in evidence.

Section 164 of the Criminal Procedure Code must be construed strictly. The section enacts that the Magistrate must "record" a statement or confession; and "recording" means, and must mean, writing down the confession and not merely filing a written confession.

If a confession already written out when the accused is under the control of the police was once allowed to be admitted in evidence, the door would be opened wide to the grossest forms of abuse, and the safeguards against admitting confessions which were not voluntary would be destroyed to a large extent.

There is no analogy between a written statement made by the accused during the course of the trial in the presence of the court and a written confession handed in to a Magistrate in proceedings under section 164 of the Criminal Procedure Code.

Emperor *v.* Ram Baran Shukla, I. L. R., 55 All. ... 426

CRIMINAL PROCEDURE CODE, SECTION 197—Sanction to prosecute—Who can file the complaint 798

CRIMINAL PROCEDURE CODE, SECTIONS 199, 238, *See* Indian Penal Code, sections 366A, 498 871

CRIMINAL PROCEDURE CODE, SECTIONS 208, 210, 347—Power to commit without hearing the whole of the prosecution evidence ... 1040

CRIMINAL PROCEDURE CODE, SECTIONS 236, 237(1) AND 307(3)—*Trial by Jury Reference by Sessions Judge against verdict of jury—Power to convict, on such reference, on a charge which was not framed but could have been framed—Arms Act (XI of 1878), sections 19(f) and 20.*] In a trial by jury on a charge under section 19(*f*) of the Arms Act the jury, by a majority of four to one, gave a verdict of acquittal. The Sessions Judge, disagreeing with the verdict, referred the case to the High Court. The High Court came to the conclusion that the accused was guilty not only of an offence under section 19(*f*) of the Arms Act but also of an offence under section 20 of that Act. *Held* that the High Court had power, under section 307(3) read with sections 236 and 237(1) of the Criminal Procedure Code, to convict the accused also of an offence under section 20 of the Arms Act, although no charge under that section had been framed at the trial.

Emperor *v.* Yashpal, I. L. R., 55 All. 681

CRIMINAL PROCEDURE CODE, SECTION 256(2)—Whether accused can file a written statement at a sessions trial 1040

CRIMINAL PROCEDURE CODE, SECTIONS 258(1), 366 AND 367—*Magistrate acquitting the accused without writing a judgment except a note on the order sheet—Judgment written a month later—Irregularity—No miscarriage of justice—Criminal Procedure Code, section 537.*] In a case under section 325 of the Indian Penal Code the trying Magistrate acquitted the accused, without writing and delivering any judgment, but merely recording an informal order of acquittal on the order sheet. On an application in revision being made to the District Magistrate, he directed the trying Magistrate to write and pronounce a judgment, and thereupon the latter wrote a judgment of acquittal, reviewing the facts of the case and discussing the evidence; this was done about a month after the accused had been acquitted. *Held* that the procedure of the Magistrate in directing the accused to be acquitted without writing a judgment was undoubtedly irregular; but the question was whether the irregularity was such as could be cured under section 537 of the Criminal Procedure Code and the question would depend upon

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whether or not there had been a failure of justice owing to the irregularity. In the present case, as the Magistrate when he did come to write and pronounce judgment was of the same opinion as he had been when he directed by an informal order the accused to be acquitted, and as he had given his reasons for that opinion based on the evidence in the case, it could not be held that there had been any miscarriage of justice.

Queen-Empress v. *Hargobind Singh*, I. L. R., 14 All. 242, distinguished.

Dhondha Kanhoo *v.* Sitaram, I. L. R., 55 All. ... 886

CRIMINAL PROCEDURE CODE, SECTIONS 342, 364—Examination of accused not to be a lengthy cross-examination 1049

CRIMINAL PROCEDURE CODE, SECTIONS 366, 367, 424, 425—*Criminal appeals decided by High Court—Judgments delivered in open court but not signed by Judge—Death of Judge before signing judgments and certifying them to the court below.*] Section 424 of the Criminal Procedure Code makes the rules contained in Chapter XXVI of the Code as to the judgments of criminal courts of original jurisdiction applicable to the judgments of any appellate court other than a High Court. It is, therefore, clear that section 367, which provides that the written judgment should be dated and signed by the presiding officer in open court, does not apply to a High Court. There is, therefore, no provision which requires that the High Court, after pronouncing a judgment in open court, should date and sign the same. All that section 425 requires is that the judgment should be certified to the court below.

So, where certain criminal appeals were disposed of by a Judge of the High Court by the delivery of judgments in open Court, which were taken down by his judgment-writer, and in some of the cases the release warrants were signed by the Judge, but the judgments, after being faired out, remained unsigned by the Judge owing to his death, it was *held* that the omission to sign the fair copies of the judgments was in no way a serious defect, and the appeals must be deemed to have been finally disposed of, and the judgments should be certified to the court below.

Emperor *v.* Pragmadho Singh, I. L. R., 55 All. ... 133

CRIMINAL PROCEDURE CODE, SECTION 367—Judgment need not contain a résumé of the entire evidence 1040

CRIMINAL PROCEDURE CODE, SECTIONS 369, 430—*High Court Rules, chapter I, rule* 1 *(xvii)(d)—Revision for enhancement filed after dismissal of appeal by High Court—Revision entertainable—Jurisdiction.*] An application for the enhancement of sentence was made on behalf of the Local Government after the dismissal of a jail appeal by a single Judge of the High Court. The sentence which had been passed was illegal, as it was less than the minimum sentence directed by the Indian Penal Code to be passed for the offence committed. The question was whether, after the appellate powers had already been exercised on the jail appeal, it was open to the High Court to consider the enhancement of the sentence in revision.

Held, that in accordance with the exception provided for by section 430 of the Criminal Procedure Code the High Court could exercise the power of enhancement, notwithstanding the fact that the jail appeal had been decided, and that in exercising the power of enhancement the Court was not in any way violating the provisions of section 369 of the Criminal Procedure Code, because the provisions of section 369 must be read subject to the provisions of section 430.

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Further, according to rule 1(*xvii*)(*d*), chapter I of the High Court Rules the powers of enhancement under chapter XXXII of the Criminal Procedure Code could be exercised by a Bench alone and that jurisdiction could not be exercised by the single Judge who decided the jail appeal. It was accordingly open to the Bench to exercise the powers of enhancement vested in the Court.

Emperor *v.* Abdul Qayum, I. L. R., 55 All. 715

CRIMINAL PROCEDURE CODE, SECTIONS 417, 418—Appeal against acquittal—Function of appellate court in such appeal 689

CRIMINAL PROCEDURE CODE, SECTIONS 418, 536—*Trial by jury of an offence triable with assessors—Trial valid—Verdict cannot be treated as opinion of assessors—Appeal lies on matters of law only—Misdirection to the jury—Appeal heard on facts.*] In a charge under section 325/149 of the Indian Penal Code there is only one offence, namely, that of rioting in the course of which grievous hurt has been caused, and the essential part of the offence is the rioting. So, in a part of the province where rioting is not an offence triable by a jury but the offence of grievous hurt is so triable, the mere addition of section 325 to section 149 will not make the case, which is essentially one of rioting, a case triable by a jury.

Where a case not triable by a jury has in fact been tried by a jury, under section 536 of the Criminal Procedure Code the trial is not vitiated thereby. The verdict of the jury in such a case cannot, however, be treated as being the opinion of assessors, and by section 418 an appeal can lie on a matter of law only. Where, however, the verdict of the jury was held to have been vitiated by misdirections, the appeal was heard on the facts.

Emperor *v.* Dakhani, I. L. R., 55 All. 68

CRIMINAL PROCEDURE CODE, SECTION 423—*Powers of appellate court—Appeal from conviction—Charges of culpable homicide and rioting—Trial court convicting on the former but omitting to record either conviction or acquittal on the latter—Whether acquittal by necessary implication—Power of appellate court to convict on the latter charge.*] At a sessions trial on charges of culpable homicide and rioting, under sections 304 and 147 of the Indian Penal Code, the Judge convicted and sentenced the accused persons under section 304, but omitted to record either a conviction or an acquittal on the charge of rioting under section 147. The language of the judgment, however, made it quite clear that the Judge found that the accused persons were guilty of rioting and that the homicide was an incident in the course of the riot and that the accused persons were therefore jointly responsible, although the individual responsibility of any one for the killing had not been established beyond doubt. In appeal against the conviction,—

Held that in the circumstances it could not be deemed that the accused persons had by necessary implication been acquitted of the offence under section 147; in fact the findings of the Judge amounted to a conviction under that section as well as under section 304. Further, under the provisions of section 423 of the Criminal Procedure Code, in an appeal from a conviction the appellate court had power to alter the finding while maintaining the sentence, and the conviction under section 304 could be altered into a conviction under section 304 read with section 149 of the Indian Penal Code although the Sessions Judge had not recorded any conviction under section 147 and therefore might possibly be deemed to have acquitted the accused of that charge. *Kishan Singh* v. *King-Emperor*, I. L. R., 50 All., 722, distinguished.

Emperor *v.* Raghunath, I. L. R., 55 All. 834

CRIMINAL PROCEDURE CODE, SECTIONS 423(*d*) AND 439—Costs of revision proceedings—Authority to pass order for such costs—Whether "consequential or incidental order" 901

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CRIMINAL PROCEDURE CODE, SECTION 435—*Revision in High Court without first applying to Sessions Judge—Practice—Criminal trial—Proof—Conviction must be based on sufficient evidence and is not justified by apathy of accused or his willingness to go to jail—Duty of court.*] In a prosecution under section 17(2) of the Criminal Law Amendment Act, 1908, the evidence was not sufficient to establish the charge and the Magistrate, without being entirely satisfied that the charge had been proved, accommodated the accused, who made no serious effort to avoid a conviction and was willing from political motives to go to jail, by convicting and sentencing him to imprisonment. The Secretary of the District Bar Association filed a revision in the High Court from this order. *Held*—

The High Court is not bound to refuse an application in revision in every case merely because it had not been presented first in the court of the District Magistrate or Sessions Judge, and it cannot be questioned that the High Court has jurisdiction, notwithstanding such omission of the applicant, to intervene in revision where it is necessary for the ends of justice. The rule of practice laid down in *Sharif Ahmad* v. *Qabul Singh*, I. L. R., 43 All., 497, has no doubt been generally but not invariably followed, and has been departed from in cases where there are special circumstances, such as where an application is presented by an outsider to the proceedings, or where the appeal from the court whose order is challenged lies direct to the High Court.

The courts are bound to protect the liberty of the individual, and even where the accused person does not claim their protection and shows himself ready to be sent to jail, whether from political or economical motives, it is nevertheless the duty of the courts to sift the evidence for the prosecution and to refuse to convict if that evidence is insufficient to prove the charge, not only because this is required by the law but also because the courts have a duty to protect the tax-payer from the unjustifiable expenditure of maintaining such accused person in jail.

Emperor v. Parshottam Das Tandon, I. L. R., 55 All.... 857

CRIMINAL PROCEDURE CODE, SECTIONS 435, 439—*Revision—Practice of High Court—Previous application in revision to Sessions Judge or District Magistrate essential to High Court entertaining revision.*] According to a practice of the High Court an application in revision to the Sessions Judge or to the District Magistrate is an essential step in the procedure of filing a criminal revision in the High Court, and failure on the part of the applicant in this respect operates as a bar to the application being entertained by the Court.

The fact that there has been an appeal to a Magistrate, first class, or even to the District Magistrate is not a compliance in principle with this rule. Inasmuch as a revision should and generally does cover different grounds from an appeal, an appeal to the District Magistrate does not serve the object underlying the rule in the same way as a revision would.

An order of admission made by a Judge of the High Court under clause (1) of section 435 of the Criminal Procedure Code is not sufficient to take the case out of the operation of such rule of practice.

The dictum to this effect in *Emperor* v. *Mansur Husain*, I. L. R., 41 All., 587, not followed.

Emperor v. Muhammad Hashim, I. L. R., 55 All. ... 961

CRIMINAL PROCEDURE CODE, SECTIONS 435, 439—Whether the High Court will examine, in revision, before conclusion of the trial in the lower court, the question whether the charge has been made out by the evidence for the prosecution 961

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CRIMINAL PROCEDURE CODE, SECTION 537—"Illegality" and "Irregularity"—Omission of Magistrate to record likelihood of a breach of peace, in proceedings under section 145 301

CRIMINAL PROCEDURE CODE, SECTION 537—Irregularity of procedure—Prejudice, *See* Criminal Procedure Code, sections 133, 139A ... 866

CRIMINAL PROCEDURE CODE, SECTION 537—Irregularity—Acquittal without writing a judgment, *See* Criminal Procedure Code, sections 258(1), 366, 367 886

CRIMINAL PROCEDURE CODE, SECTION 539A—*Affidavit by accused person in support of an application for transfer—Affidavit containing false allegations against conduct of public servant—No immunity from prosecution for perjury—Indian Penal Code, sections* 193, 199.] Section 539A of the Code of Criminal Procedure applies to any person who chooses to make allegations respecting a public servant and in support of those allegations swears an affidavit. There is nothing to show that the section does not apply to an accused person, and if he swears a false affidavit he is liable to be prosecuted for perjury.

Emperor v. *Matan*, I. L. R., 33 All., 163, declared obsolete.
Badri Prasad v. Jhamman, I. L. R., 55 All. ... 114

CRIMINAL PROSECUTION—*Dispute of a civil nature—Using the criminal courts for enforcing a civil claim—Indian Penal Code, section 420—Cheating—Jurisdiction—Civil and criminal courts.*] The complainant had pawned certain ornaments with the accused, Mst. Sudeshara; he alleged that he repaid the money but the accused refused to return the ornaments. A charge under section 420 of the Indian Penal Code was brought. The defence was that the transaction took place through one Mst. Katoni, and that Mst. Katoni subsequently borrowed another Rs.80 and therefore the pawnee would not return the articles until the subsequent loan was repaid. At the trial Mst. Katoni's evidence supported the accused. The accused was, however, convicted and sentenced. *Held*, in revision, acquitting the accused, that the dispute in this case clearly ought to have been settled in the civil court. Persons having claims, often of a doubtful nature, frequently took criminal proceedings in the hope that the defendant would pay up the amount claimed rather than face a criminal charge; but to use the criminal courts for enforcing a civil claim was highly improper, and might almost amount to blackmail.

Emperor v. Sudeshara, I. L. R., 55 All. 562

CRIMINAL TRIAL—Acquittal without writing a judgment, *See* Criminal Procedure Code, sections 258(1), 366, 367 886

CRIMINAL TRIALS—*Duties of prosecution and of courts—Identification by witnesses—Mode of conducting identification—Witness—Whether a witness falsely implicating one accused should be believed as against others—Oath, efficacy of.*] In a case of communal rioting with murder 83 persons were committed by the Magistrate for trial, of whom 32 were convicted by the Sessions Judge. 7 of them were sentenced to death, among them being one Shukul. The evidence of 17 principal witnesses went to show that this Shukul was the leader and most active member of the mob, that he scaled high walls, climbed on roofs and acted like a man of powerful physique and athletic prowess and agility. During the hearing of the appeal in the High Court Shukul appeared in Court and was seen to be a wizened and decrepit old man of 70, unable to stand erect; and a medical examination revealed that on account of a peculiar bony formation of his left foot he was unable to stand erect, much less run about or climb roofs, and was a weak, done old man, and that his condition had been the same two or three years ago. The Court thereupon held that the 17 witnesses had committed perjury in respect of their statements regarding Shukul, and no reliance could,

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therefore, be placed upon their evidence as against the other accused; and as the other evidence in the case was unsatisfactory, the Court acquitted all the accused. In their judgment the High Court made the following observations :—

The duty of the police in the investigation of any crime is to discover the truth and not simply to obtain evidence for the purpose of securing a conviction. It is the duty of the prosecution to lay before the court all the evidence, even though some of that evidence may be in favour of the accused person and may result in an acquittal.

It is the duty of the committing Magistrate and the trial Judge to be solicitous in the interests of the accused. They should take great pains to examine the evidence minutely in considering the prosecution case, especially where there is a large number of accused. It is emphatically the duty of the Magistrate who commits or the Judge who convicts to see each of the accused before he commits or convicts.

In certain instances, where a witness was unable to pick out a particular accused he had named from amongst the accused persons, the accused person or persons whom it was desired that the witness should identify were asked to stand up and, in one case, also made to give their names, and the witness then identified the accused: This procedure reduced the identification to a mere farce and identification thus obtained was worthless.

In cases where there is reason to believe that certain accused, on the ground of enmity or otherwise, may have been falsely charged, then the evidence of those witnesses who have reasons falsely to implicate the particular accused should not be relied on as against that particular accused; on the other hand, the same witnesses might be relied upon against other accused where there is no reason to suspect enmity on the part of the witnesses. Where, however, perjury has definitely been brought home to a witness, it would be extremely dangerous to rely on his evidence against any one. If a witness lies as against one person, his evidence against another should not be relied upon.

There is no religious sanction behind the oath as at present administered to Indian witnesses. A binding oath with religious sanction behind it is one of the foundations of the administration of justice.

Emperor *v.* Shukul, I. L. R., 55 All. 379

CRIMINAL TRIAL—Evidence—Conviction must be based on sufficient evidence and is not justified by apathy of the accused or his willingness to go to jail—Duty of court 857

CRIMINAL TRIAL—Unnecessary multiplication of evidence should be avoided, *See* Indian Penal Code, section 121A 1040

CUSTOMARY LAW, *See* Pre-emption 487

DEVOLUTION RULES, 1920, SCHEDULE I, PART II, PARAGRAPHS 1, 17, *See* Powers of local legislature to affect the jurisdiction and powers of the High Court 1009

DISCRETION OF COURT—Suit for restitution of conjugal rights under Muhammadan law—Power to impose conditions of payment of prompt dower and other equitable or necessary conditions ... 713

DISTRICT BOARDS ACT (LOCAL ACT X OF 1922), SECTIONS 18, 19, 20 —*Election petition—Decided by District Judge as election court —Revision to High Court—Powers of superintendence of High Court—Civil Procedure Code, section* 115—*Letters Patent, sections* 11, 35—*Government of India Act*, 1915, *section* 107—*Powers of local legislature—Whether section* 19 (2)(*e*) *of District Boards Act* ultra vires—*Government of India Act*, 1915 & 1919, *sections*

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45A, 80A, 84—*Devolution Rules*, 1920, *schedule I, part II, paragraphs* 1, 17.] No revision lies to the High Court from the decision of a District Judge hearing an election petition under section 18 of the District Boards Act, 1922, nor is such tribunal under the powers of superintendence of the High Court under section 107 of the Government of India Act. In such cases the election court is presided over by the District Judge as a *persona designata* under section 18 of the District Boards Act, and the court is not a civil court.

Per MUKERJI, J. :—Having regard to the provisions of section 20, clauses (1) and (2) of the District Boards Act, it is clear that the District Judge, when acting as the presiding officer of an election court, is to have the powers and privileges of a civil court but not the status. The District Judge acts as a *persona designata* and not as a civil court; therefore, no revision lies to the High Court either under the Civil Procedure Code or under section 107 of the Government of India Act, and it is unnecessary to consider the other questions raised in the case.

Per BENNET, J. :—The local legislature has power (with previous sanction) to pass laws affecting the jurisdiction and powers of the High Court, whether derived from the Government of India Act, the Letters Patent, or the Codes. The power of superintendence under section 107 of the Government of India Act depends on appellate power and can also be affected by laws of the local legislature. Section 19(2)(*e*) of the District Boards Act, 1922, is not *ultra vires* the local legislature.

Where a special tribunal is created by an Act of the local legislature or of the Indian legislature to determine rights created by that Act, and that Act states that the decision of the tribunal shall be final, there is no interference with the rights of appeal, superintendence, or revision of the High Court, because the High Court never had such rights over that tribunal. Such a tribunal is created by sections 18 to 23 of the United Provinces District Boards Act, 1922, and under these sections an election petition is not tried in the court of the District Judge but the District Judge presides in the election court as a *persona designata*.

The Government of India Act of 1915 continued the system under which legislation affecting the jurisdiction and powers of the High Courts was to be made by the Governor-General in Legislative Council, and there was no provision for such legislation by the local legislatures. The powers of the local legislatures were extended by the Government of India Act of 1919, and the Devolution Rules of 1920, schedule I, part II, paragraph 17, so that the local legislatures may, subject to the previous sanction of the Governor-General, legislate on the constitution, powers, maintenance and organization of the High Court. It is the Devolution Rules of 1920, provided for by section 45A of the Government of India Act of 1919, which regulate the subjects on which each legislature may legislate; and the provisions in the Rules which give the local legislatures power in regard to High Courts are not repugnant to section 131(3) of the Government of India Act.

Ghulam Nizam-uddin *v.* Akhtar Husain Khan, I. L. R., 55 All. 1008

DISTRICT BOARDS ACT (LOCAL ACT X OF 1922), SECTIONS 34, 182—*Indian Penal Code, section* 168—*Member of District Board engaging in trade on contracts by the Board—Sanction to prosecute—Criminal Procedure Code, section* 197—*Whether complaint by District Board necessary.*] A member of a District Board, without obtaining the permission of the Commissioner, entered

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into contracts, in another person's name, given on behalf of the Board by its Education Committee for the supply of coir matting and carried on that business for about two years. The Local Government sanctioned, under section 197 of the Criminal Procedure Code, his prosecution under section 168 of the Indian Penal Code read with section 34 of the District Boards Act. This sanction was conveyed in a letter addressed to the Deputy Commissioner, and the complaint was filed in court by the Assistant Inspector of Schools, according to the direction of the Deputy Commissioner.

Held that it was not necessary that the Deputy Commissioner should have himself filed the complaint because the letter of sanction was addressed to him. There is no provision in section 197 of the Criminal Procedure Code for a sanction to be addressed to any particular officer. A sanction is an order directing the prosecution of a certain person, and in the ordinary way that order is conveyed to the authorities who are responsible for initiating prosecutions in the locality in question.

Held, also, that it was not necessary that there should have been a complaint by or on behalf of the Board in accordance with section 182 of the District Boards Act. That section refers only to offences which are punishable under the said Act or under any rule or by-law; and the offence in question, though arising under section 34 of the District Boards Act, was not punishable under that section, which prescribed no penalty; on the contrary it was punishable under section 168 of the Indian Penal Code.

Held, further, that the exemption contained in section 34(2), clause (*f*) of the District Boards Act refers to occasional sales of single articles, as distinct from contracts for the supply of large quantities of any material, and was inapplicable to the present case.

Emperor *v.* Rudra Datt Bhatt, I. L. R., 55 All. ... 798

DISTRICT BOARDS ACT (LOCAL ACT X OF 1922), SECTION 35(3). *Question regarding due election of Chairman Forum Tribunal to be appointed by Local Government—Refusal of Government to appoint tribunal—Civil court—Jurisdiction impliedly barred Civil Procedure Code, section 9—Right to vote at election of Chairman Interpretation of statutes—Proceedings of Legislative Council.*] The jurisdiction of the civil court to try a suit challenging the validity of the election of a Chairman of a District Board is impliedly barred by section 35(3) of the United Provinces District Boards Act; and even an arbitrary disregard by the Local Government of the mandatory provisions of that section, by refusing to appoint a tribunal to decide the question, does not bring into play the jurisdiction of the civil court.

The plaintiff sought redress with respect to the infringement of his right as an elected member of the Board to participate in the election of the Chairman, a right created by section 35 A of the District Boards Act. It is well settled that where the statute which creates the right also prescribes a particular remedy for the infringement of that right, that remedy, and that remedy alone, can be pursued by the person complaining of the infringement. When the Act prescribes that a dispute as to the validity of the election of a Chairman is to be decided by a tribunal appointed by the Local Government, it follows that the tribunal's jurisdiction to determine such disputes is exclusive and the jurisdiction of the civil courts is entirely barred. The legislature cannot have intended that the civil court should also have, so to say, dormant jurisdiction to decide the question and that that jurisdiction is to become active the moment the Local Government refuses to appoint a tribunal.

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Where the law is clear, it is the duty of the court to give effect to it without attempting to inquire into the reasons for the enactment, and the court is not justified in appealing to the proceedings of the Legislative Council and to the alleged interpretation put upon the enactment by the Minister concerned.

Joti Prasad Upadhiya *v.* Amba Prasad, I. L. R., 55 All. ... 406

DIVORCE—*Adultery—Proof—Inference from evidence of opportunity—Presumption—Evidence Act (I of 1872), section 114.*] In divorce cases it is not necessary to prove the direct fact of adultery; nor is it necessary to prove the existence of guilty affection in every case. Adultery may legitimately be inferred from evidence of opportunity, where the circumstances are such as would lead a reasonable and just person to the conclusion that adultery had been committed. Section 114 of the Evidence Act authorizes such inference or presumption.

So, where the respondent and the co-respondent had gone away from the former's house at Allahabad and lived together in the latter's house at Cawnpore for one week, no one else residing there during that time, and when the husband went there and asked the respondent to come away with him she refused and continued to live in the house alone with the co-respondent for several days more, and no satisfactory explanation was given of these circumstances, it was *held* that although there was no direct evidence of adultery, and no evidence of any guilty affection or undue familiarity between the respondent and the co-respondent, the circumstances could only lead to one inference, that is, that adultery had been committed.

Cyril Gibbs *v.* Ellen Gibbs, I. L. R., 55 All. ... 597

DIVORCE—*Adultery and cruelty—Evidence—Communication of venereal disease by husband—Doctors' evidence—Privilege.*] The fact that a husband has communicated venereal disease to his wife is in law sufficient evidence of adultery. It also amounts to legal cruelty.

There is no protection afforded by the Evidence Act to a doctor as such. When a doctor is called to give evidence he is in the same position as any other person not exempted by the Act. It is his duty to assist the court in every way possible and to disclose to the court all the information in his possession relevant to the matter in issue. He cannot claim privilege, on the allegation that the relationship of doctor and patient is confidential.

Edna May Hardless *v.* Harold Richard Hardless, I. L. R., 55 All. 134

DIVORCE ACT (IV OF 1869), SECTIONS 3(5), 45, 49—"Minor"—Petition for divorce by girl of 19—Whether next friend necessary ... 243

DIVORCE ACT (IV OF 1869), SECTIONS 4, 7, 19—*Nullity of marriage—Idiocy—Undeveloped mentality—Consent by person with the mentality of a child—Christian Marriage Act (XV of 1872), sections 4 and 5—Validity as Christian marriage according to rules, rites, and ceremonies of Church—Jurisdiction to deal with such question—Non-publication of banns, effect of—"Rules of Church", meaning of—Canon law, whether binding on civil courts.*] An idiot, in law, means something more than mere feeble-mindedness and undeveloped intellect. So, where a man of 54 years of age was from birth feeble-minded and had not developed beyond the intelligence and mentality of a child of 8 or 9 years, it was *held* that he could not be termed an idiot within the meaning of section 19(3) of the Divorce Act but that he was incapable of understanding what the relationship of marriage meant and of giving his consent and thereby contracting a valid marriage. A marriage entered into by such a person was declared null and void under section 19 on the ground of want of consent.

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The High Court has jurisdiction to hear and decide questions under the Indian Christian Marriage Act. Such jurisdiction is not negatived by anything contained in section 4 of the Divorce Act. Questions arise under sections 4 and 5 of the Indian Christian Marriage Act when the marriage has not been validly performed, and to deny jurisdiction to the courts to decide such questions would make the Act a dead letter.

A marriage between a Roman Catholic and a Protestant was solemnized by a Priest of the Roman Catholic Church. The banns for the marriage were called only once and the marriage was performed the next day. It appeared that, according to the rules of the Roman Catholic Church, two dispensations from the Bishop were necessary, one for the mixed marriage and another for performing the marriage without due publication of banns; but no dispensation had been obtained: *Held* that the marriage was not solemnized according to the rules, rites, ceremonies and customs of the Church of which the person solemnizing the marriage was a Minister, and the marriage was therefore void under sections 4 and 5 of the Indian Christian Marriage Act. Further, the marriage could not be held to be validated by the Canon law of the Roman Church under which, it was said, the marriage would be "gravely unlawful but valid". The civil courts could not interpret or administer the Canon law, but only the civil law. The Canon law in question could not be deemed to be a "rule of the Church" within the meaning of section 5 of the Indian Christian Marriage Act, which has nothing to do with the Canon law.

The English law, to the effect that the absence of due publication of banns can make the marriage void only if the lack of due publication is within the knowledge of both the parties to the marriage, is no guide to the Indian courts, notwithstanding the provisions of section 7 of the Divorce Act; for, in the Indian Christian Marriage Act there is nothing equivalent to the wording in section 22 of the Marriage Act in England which provides that where persons knowingly and wilfully intermarry without due publication of banns, the marriage is void.

Alfred Robert Jones *v.* Titli, I. L. R., 55 All. ... 185

DIVORCE ACT (IV OF 1869), SECTION 7—*Age of consent—Marriage of girl of* 13—*Validity—Divorce Act (IV of* 1869), *sections* 3(5), 45, 49—"*Minor*"—*Age of majority—Petition for divorce by girl of* 19—*Whether next friend necessary.*] A marriage among Anglo-Indians domiciled in India took place in October, 1926, the bride being just 13 years old. On the question whether the girl was capable of giving a valid consent to her marriage it was *held* that for a Christian marriage in India the age of consent at the date of this marriage would be 12 for the girl, that being the then state of the law in England. There was nothing either in the Indian Divorce Act or the Christian Marriage Act as regards the age of consent; and under section 7 of the Indian Divorce Act the Indian High Courts had to act, subject to the provisions of that Act, according to the principles and rules on which the Divorce Court in England for the time being acted.

A petition for divorce was filed by the wife, an Anglo-Indian domiciled in India and of 19 years of age. On the question whether under section 49 of the Divorce Act the petitioner was a minor and the petition had to be filed through a next friend, it was *held* that having regard to sections 3 (5) and 45 of the Divorce Act and to the fact that under the Civil Procedure Code a next friend was not necessary for a suitor of over 18 years of age, the petitioner was not a minor within the meaning of section 49 and a next friend was not required.

Goodal *v.* Goodal, I. L. R., 55 All. 243

DOCTORS' EVIDENCE—No privilege 134

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DUTY OF COURT TO PREVENT INJURY FROM ITS OWN ACT. *See* Civil Procedure Code, sections 144, 151 221

EASEMENTS ACT (V OF 1882), SECTIONS 28, 33, 35 AND 43—*Prescriptive right to light—Measure of right—Substantial interference—Easement of discharging rain water—Material increase of burden caused by change in the dominant heritage—Easement extinguished.*] Where the plaintiff established a right of easement of discharging rain water from the eaves of her kachcha house with a gabled roof so that half the water fell on the defendant's land which adjoined the house on one side, but later she changed the kachcha house into a pucca house with a flat roof discharging the entire rain water through a single spout on the defendant's land, it was *held* that there being a complete change in the character of the easement, the burden whereof had been materially increased, the easement was extinguished.

Held, also, that a plaintiff is not entitled to a mandatory injunction for demolishing the defendant's wall blocking the passage of light to one of several windows of a room in the second storey of the plaintiff's house unless the plaintiff proves that the disturbance of the right of easement of receiving light has caused substantial damage within the meaning of section 33, explanation II, of the Easements Act. Section 28 of the Act should be read together with sections 33 and 35; and any interference with the extent of the prescriptive right, as mentioned in section 28(c), will not give a right of action either for damages or for a mandatory injunction unless the degree of interference is such as to come within explanation II of section 33.

Panna v. Ram Saran, I. L. R., 55 All. 711

ELECTION—*Choice of two remedies which are not co-existent but alternative—Adoption of one bars the other—Estoppel—Decree-holder accepting payment of decree money is barred from pressing appeal against order which had set aside the sale—Civil Procedure Code, section 11, explanation IV—Constructive* res judicata *arising out of execution proceedings—Transfer of Property Act (IV of 1882), section 52—Affected by doctrine of election.*] Mortgaged property was sold in execution of a decree for sale and was purchased by the mortgagee decree-holder. On an application by the judgment-debtor the sale was set aside, and two days later he sold the property by private sale. The decree-holder filed an appeal against the order setting aside the sale; to that appeal the vendee was not a party. A few days later the vendee deposited in the execution court money for discharging the decretal amount. Before the appeal came up for hearing, the decree-holder withdrew the money from the execution court, but he did not mention this fact at the hearing of the appeal, which was in due course heard and allowed. The decree-holder then claimed the property as his, and the vendee brought a suit against him for declaration of the vendee's title.

Held that the doctrine of election applied to the case. Where a litigant has a right to choose between two remedies which are not co-existent but alternative, and adopts one of those remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute. When the decretal amount was deposited in court the decree-holder had two alternative remedies; he could either take the money or prosecute his appeal. He definitely adopted the first and was thereby absolutely estopped and barred from prosecuting his appeal. He acted dishonestly in prosecuting his appeal after having taken the money, and he obtained a decision of the appeal in his favour by keeping the appellate court ignorant of the fact of his having withdrawn the money.

Qudrat-un-nissa Bibi v. *Abdul Rashid*, I. L. R., 48 All., 616, distinguished.

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Held, also, that the fact that the point about the doctrine of election was not raised in the execution appeal did not operate as constructive *res judicata* under explanation IV of section 11 of the Civil Procedure Code. An implied decision in execution proceedings cannot be a bar to the trial of a question which arises in a subsequent suit. Further, as the question arising in the execution appeal had to be decided on the facts relating to the sale, and the withdrawal of the money was a new fact arising long after the sale, it could not be said that this point was one which might and ought to have been raised in that appeal.

Held, further, that by the application of the doctrine of election the decree-holder was estopped from relying on section 52 of the Transfer of Property Act.

Mangat Rai v. Duli Chand, I. L. R., 55 All. ... 735

ELECTION PETITION—Whether revision lies to High Court from decision of election petition by District Judge. *See* District Boards Act, sections 18, 19, 20 1008

ESTOPPEL—Acquiescence by author in infringement of copyright by some others 664

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EVIDENCE—Testimony of perjured witness should be entirely discarded and not used for any purpose 639

EVIDENCE ACT (I OF 1872), SECTIONS 2, 3, 32(5). *See* Muhammadan law—Marriage 139

EVIDENCE ACT (I OF 1872), SECTION 11—Printed newspaper whether evidence of the facts stated therein 1040

EVIDENCE ACT (I OF 1872), SECTIONS 24, 28—*Confession—Induced by promise of pardon—Degree of proof necessary to establish inducement—Evidence Act (I of 1872), section 30—Retracted confession of co-accused—Value thereof—Corroboration necessary—Approver's evidence—Criminal Procedure Code, section 164—Extent of duty of Magistrate recording a confession—Identification—Value as corroborative evidence.*] The retracted confession of a co-accused can undoubtedly be used or taken into consideration under section 30 of the Evidence Act as against the other accused, but it, like the evidence of an approver, is not sufficient for conviction unless it is corroborated in material particulars.

The evidence of an approver, coupled with the retracted confession of a co-accused, is not sufficient for conviction of an accused person if there is no other reliable evidence in corroboration as regards the identity of that accused person.

Where the identifying witnesses, in each case, picked out many more persons who were not at all connected with the crime than persons who were suspected, such reckless identification was valueless as corroborative evidence.

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Section 24 of the Evidence Act does not require the same cogency of evidence as is necessary to establish a fact. It is almost impossible for the accused person to adduce any reliable direct evidence of maltreatment or inducement while he was in police custody. The section merely requires that if it "appears" to the court, i.e. if circumstances create a probability in the mind of the court, that the confession was improperly obtained, it shall be inadmissible in evidence.

Two persons who had been arrested in connection with a dacoity and been kept in jail for a few days, were put up before a Magistrate for recording their confessions under section 164 of the Criminal Procedure Code. As soon as the Magistrate put the usual questions and gave them the usual warning regarding the consequences of any confessions they might make, they refused to make any statement. They were then taken outside where they remained in the company of certain police officers for some minutes. They then returned and said that they would confess and their statements were recorded. One of them was subsequently made an approver but not the other, who retracted his confession at the trial. Regarding this confession it was *held* that the inference was irresistible from these events that a promise of pardon had been held out to them but the Magistrate's warning opened their eyes and they refused to make any confession until they were re-assured by the police officers outside that the Magistrate's warning was purely formal and of no significance. The confession in question was inadmissible in evidence by section 24 of the Evidence Act. Section 28 could not be applied because obviously the warning conveyed by the Magistrate did not remove the impression caused by the inducement.

It is not the function of the Magistrate, when he is to record statements under section 164 of the Criminal Procedure Code, to reduce to writing what the persons placed before him say only if they make statements which the police expect them to make and otherwise to make no note of anything which they say. It was the duty of the Magistrate to have kept a record of what the accused were asked and what they stated on the first occasion when they were placed before him and when they refused to make any confession.

Emperor *v.* Nazir, I. L. R., 55 All. 91

EVIDENCE ACT (I OF 1872), SECTION 27, *See* Criminal Procedure Code, section 162 463

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EVIDENCE ACT (I OF 1872), SECTION 45—Expert evidence as to identity of typewriter used for several documents—Whether admissible as "expert evidence" 1040

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EX PARTE ORDER IN EXECUTION—Inherent jurisdiction to set aside, *See* Civil Procedure Code, sections 141, 151 891

EXECUTION COURT'S POWER TO MODIFY DECREE, *See* Civil Procedure Code, order XXIII, rule 3 334

FURTHER CHARGE—Stipulation that the subsequent loan must be paid before redemption of initial mortgage, *See* Redemption 359

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GENERAL RULES (CIVIL) VOLUME II, APPENDIX I(III(1)), RULE 2—Time prescribed for holding auction sales. *See* Civil Procedure Code, order XXI, rules 66, 69, 90 519

GIFT—Construction of deed—Gift of immovable property to female—Absolute or life interest. *See* Hindu law 61

GOVERNMENT OF INDIA ACT, 1915, SECTION 107—Powers of superintendence of High Court—Whether local legislature has power to affect the jurisdiction and powers of High Court 1008

GOVERNMENT OF INDIA ACT, 1915 & 1919, SECTIONS 45A, 80A, 81, *See* Powers of local legislature to affect the jurisdiction and powers of the High Court 1008

GROVE-HOLDER—Right to plant new trees, *See* Agra Tenancy Act, sections 3(11), 112, 197 73

HIGH COURT RULES, CHAPTER XV, RULES 10, 15—Enrolment of advocates. *See* Barrister and client 570

HINDU LAW—*Adoption—Authority to adopt—Construction*—Khandani rishtadaran—*Estoppel.*] A Hindu by his will authorized one of his two widows to adopt, but forbade her to adopt any son of the relations of her family (*khandani rishtadaran*), or of that of her co-widow, or of his mother; if his brother should give his son in adoption, he should be adopted:—

Held that the will precluded the widow from adopting the son of a daughter of her brother. The word "*khandani*" was used in a general sense as referring to blood relations; the principle that a Hindu female on marriage passes into her husband's family could not be invoked, as it would exclude authority to adopt the son of the testator's brother or any agnatic relation of his.

Held, further, that it had been rightly conceded on appeal that the widow was not estopped from denying that the adoption was invalid under the terms of the will

Kalawati Devi v. Dharam Prakash, I. L. R., 55 All. ... 78

HINDU LAW—*Alienation by widow—Consent of next reversioner—Presumption of legal necessity—Nature and extent of presumption—Widow marrying second husband—Marriage of daughter born of the second marriage is not legal necessity justifying alienation of first husband's property—Estoppel—Consenting reversioner bound by the alienation.*] In case of an alienation of her husband's property made by a Hindu widow with the consent of the next reversioner, such consent raises a presumption, which is rebuttable, that the alienation was justified by legal necessity. It is to be noted, however, that the only presumption in such cases is that the alienation *itself* was justified by legal necessity, and once that presumption is rebutted there is no presumption that all or any of the items of consideration for the alienation were for justifiable purposes. So, where a sale was effected by a Hindu widow, in which the next reversioner joined, for Rs.4,656, out of which Rs.2,778 was paid in cash and the balance was applied in payment of certain debts which had been incurred by the widow, and it was shown that the Rs.2,778 was not supported by any legal necessity, it was *held* that the presumption that the sale *itself* was justified by legal necessity was displaced, with the result that there was no presumption in favour of any items of the consideration being justified by legal necessity, and it was for the vendee to prove that the previous debts of the widow were supported by legal necessity; and he having failed to prove it, the plaintiffs reversioners were entitled to an unconditional declaration that the sale was not binding on them.

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The next reversioner, however, who had joined in the execution of the sale deed and received a portion of the consideration, was estopped from assailing the validity of the sale and the sale was binding on him.

Where a Hindu widow married a second husband and daughters were born of the second marriage, it was *held* that the marriage of such daughters could not constitute legal necessity justifying an alienation of the first husband's property.

Indarjit Singh v. Jaddu, I. L. R., 55 All. 157

HINDU LAW—*Father's debts—Liability of sons—Independent of whether the father is manager of the joint family—Independent of whether the joint family contains other members also—Nature of debt—Practice and pleading—Plaint alleging legal necessity for debt but not mentioning pious obligation of sons—Limitation—Stipulation that in default of payment of interest the principal also would become due.*] The liability of a Hindu son to discharge his father's debts not tainted with immorality is irrespective of the fact whether the father is or is not the manager of the joint family, or of the fact whether the joint family does or does not also comprise persons other than the father and the sons, like brothers and nephews. All that is necessary to bring into play the pious obligation of the sons is that the debt must have been incurred by their father and must not have been raised for an immoral purpose.

In considering the question of the pious obligation of the sons care must be taken not to confuse two distinct aspects of the matter, (1) the father's power to alienate the sons' shares during his lifetime for debts incurred by him which were not raised for family necessity but at the same time were not tainted with immorality, and (2) the creditor's remedy for the recovery of such debts by sale of the sons' shares. The father can exercise the right to alienate the family property to discharge such debts only if the family consists of the father and the sons and of no other male members, for the simple reason that those other members are under no pious obligation to pay the debts of the father; but the creditor's right to recover such debts by sale of the sons' interests in the family property is untrammeled by any such limitation, for the obvious reason that his right is not co-extensive with or based on the father's right to alienate the family property but on the pious obligation of the sons, which is controlled only by the conditions that the debt should not be tainted with immorality and that it can be realised only from the joint ancestral property in the hands of the sons.

In a suit by the creditor against the father and the sons for recovery of a simple money debt taken by the father the allegation in the plaint was that the debt had been contracted for the benefit of the family, but this was not established: *Held*, that such allegation in the plaint did not exclude the possibility of the sons being made liable for the debt on the basis of their pious obligation, unless it was proved by them that the debt had been incurred for an immoral purpose; and the sons could not be deemed to have been prejudiced by the absence of an express allegation in the plaint that they were under a pious obligation to pay the debt of their father.

A stipulation in a bond entitling the creditor, on the occurrence of default in payment of six-monthly interest, to sue for the entire amount although the period fixed for repayment of the principal had not expired, is a stipulation for the benefit of the creditor, which it is open to him to waive at his option. If the creditor waives such option, the bond does not become payable until the expiry of the period fixed for repayment, and limitation begins to run from such expiry.

Lalta Prasad v. Gajadhar Shukul, I. L. R., 55 All. ... 283

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HINDU LAW—*Father's debts—Suretyship debt—Father standing security for payment of money—Son's liability not dependent on whether the father had received consideration for standing security.*] Under the Mitakshara law the liability of a son for the payment of a debt incurred by the father by way of standing surety for the payment of a sum of money is independent of whether any consideration had been received by the father.

According to the texts of the Mitakshara the liability of the surety himself exists, for the payment of the debt incurred by becoming surety, where the surety is for appearance, for confidence or for payment; the liability of the son exists in the case of surety for payment. But if the surety for appearance or for confidence had bound himself after taking some property in pledge, then his sons also must pay the suretyship debt, from the property taken in pledge. The case of the grandson is different, and apparently there is no liability on him in any case.

Dwarka Das v. Kishan Das, I. L. R., 55 All. ... 675

HINDU LAW—*Gift—Construction of deed—Gift of immovable property to female—Gift for maintenance—*"Malik mustaqil"—*Absolute or life interest.*] By a registered deed a Hindu stated that, as he desired to provide for the support and maintenance of his daughter-in-law, he had made a gift of specified immovable property to her for that purpose, and he thereby declared that she should remain absolute owner (*malik mustaqil*) of the property and pay the Government revenue: *Held* that the deed conferred upon the donee an absolute estate in the property with power to make alienations giving titles valid after her death.

Decree of the High Court affirmed.

Bishnath Prasad Singh v. Chandika Prasad Kumari, I. L. R., 55 All. 61

HINDU LAW—*Joint family—Son's liability for father's debts—Joint family consisting of several brothers and their sons—Pious obligation of son does not arise unless family consists of father and sons only—Companies Act (VII of 1913), section 160—Contributories in case of death of member—Extent of liability of Hindu sons as such contributories—Companies Act (VII of 1913), section 30—Subscribers of memorandum are members, not merely persons who have contracted to purchase shares—Companies Act (VII of 1913), section 156—Deceased member is not a "past member".*] The doctrine of pious obligation of a Hindu son to pay his father's debts would be available only when there is a family consisting of father and sons; where the family consists not only of the father and the sons, but also of brothers and nephews of the father, the position becomes entirely different. In the latter case, if the person who has incurred the debt be the manager of the family, he can bind the family only if he has incurred the debt for the benefit of the family; if he be not the manager, he cannot bind the family in any circumstances. If there is no benefit to the family, the debt can be realized by attachment, in execution, of the share of the debtor in his lifetime and sale thereof; but the share of the debtor's son would not be liable to be sold. If there be no attachment in the lifetime of the debtor, his interest would pass by survivorship to the remaining members of the family and the creditor would be without any remedy whatsoever.

Proposition No. 2 as enunciated by the Privy Council in *Brij Narain's* case, I. L. R., 46 All., 95, is confined to the case of a family consisting of a father and his sons only, and if there be more members, like brothers and nephews, of the family then the case falls under proposition No. 1.

So, where a joint family consisted of three brothers and their sons, and one of the brothers subscribed to the memorandum of

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association of a company for a certain number of shares but did not pay for them, and the official liquidator of the company in liquidation applied to have the deceased subscriber's son and nephews made contributories in his place, it was *held* (1) that as it had been found that the purchase of the shares was not for the benefit of the family, neither the nephews nor the son nor the joint family property in their hands could be made liable for the debt; and (2) that the son could be made liable only to the extent of any separate or self-acquired property of his father in his hands, and to that extent he was a contributory under section 160 of the Companies Act.

Section 30 of the Companies Act means that the subscribers of the memorandum of association of a company are to be treated as having become members of the company, by the very fact of the subscription, and not merely persons who had contracted to take shares, against whom a suit for specific performance had to be brought to make them take up the shares.

A member of a company who has died is not a "past member" within the meaning of section 156 of the Companies Act. Section 156 deals with the case of a member who has legally parted with his shares, and not one whose shares have devolved by inheritance on his death.

Official Liquidator, U. P. Oil Mills Company, Limited *v.* Jamna Prasad, I. L. R., 55 All. 417

HINDU LAW—*Joint family property—Alienation—Mortgage for payment of a pre-emption decree—Acquisition of new property—Legal necessity—"Benefit to the estate"—Whether benefit of a defensive nature only is meant.*] Two brothers, who were the adult members of a joint Hindu family, mortgaged the family property in order to raise money for payment on a decree obtained by them for pre-empting some other property. A suit to enforce the mortgage was brought against one brother and the minor sons of the other brother who had died. The question was whether the mortgage was justified by Hindu law and binding on the family property. The findings were that the acquisition of the new property, by borrowed money, was not justified by legal necessity and was not for the benefit of the family and the family estate. *Held*, by the Full Bench, that the mortgage was not binding on the joint family property.

No question of antecedent debt arose in the case, as money which is payable on a decree for pre-emption is not a debt at all.

On the question as to whether and how far a mortgage of joint family property by the manager, for the purpose of acquisition of new property, is justifiable on the ground that such acquisition is for the benefit of the estate, *Held*—

Per SULAIMAN, C. J.—Where the acquisition of the new property was not speculative, but in the best interests of the family and for its benefit as well as for the benefit of the family estate, which an ordinary prudent manager would make, it would be open to a court to hold that the transaction is binding on the other members of the family, even though it is the raising of a loan on a mortgage of family property for the sake of satisfying a pre-emption decree. The question is in all cases a mixed question of law and fact, and the answer to it must depend on the special circumstances of each case. The authority of *Jagat Narain's* case, I. L. R., 50 All., 969, has not been shaken by the Privy Council decision in *Benares Bank* case, I. L. R., 54 All., 564.

Per MUKERJI, J.—The law relating to the power of the manager of a joint Hindu family to make alienations of the family property, as laid down by the Privy Council in *Hunooman Persaud's* case, 6 Moo. I. A., 393, is the same law as is laid down

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in verses 27 to 29 of chapter I, section 1, of the Mitakshara. The right interpretation of the phrase "benefit of the estate", used by the Privy Council in the judgment in that case, must be that the benefit is to be of the same nature as the illustrations thereof given in that judgment, i.e. the benefit is to be of a protective or defensive character, by way of removing a pressure or averting a danger threatening the estate; and this interpretation would be in accordance with the Mitakshara, and also in consonance with the law as stated in *Brij Narain's* case, I. L. R., 46 All., 95. There is nothing to indicate that the Privy Council was contemplating any case in which benefit was to be conferred by adding more property to the family, by alienating or by mortgaging the existing property. The decision of the Privy Council in *Benares Bank* case, I. L. R., 54 All., 564, has entirely destroyed the authority of *Jagat Narain's* case, I. L. R., 50 All., 969.

Per KING, J.—There can be circumstances in which the acquisition of new property, by pre-emption or otherwise, can be held to be justified by legal necessity. Also, in certain circumstances it may be held that such acquisition was a beneficial and prudent act such as would justify a mortgage of joint family property by the manager. But the facts showing that the transaction was beneficial and prudent must be proved; the acquisition of new property, with money raised upon a mortgage, need not necessarily be of benefit to the estate. In view of the findings in the present case, the question did not arise as to whether the expression "for the benefit of the estate" used in *Hunooman Persaud's* case, 6 Moo. I. A., 393, should be given a very restricted meaning so as to apply only to transactions of a "defensive" nature. The authority of *Jagat Narain's* case, I. L. R., 50 All., 969, has not been shaken by the Privy Council decision in *Benares Bank* case, I. L. R., 54 All., 564.

Amrej Singh v. Shambhu Singh, I. L. R., 55 All. ... 1

HINDU LAW—*Joint family property—Alienation by manager, not being the father—Legal necessity must be proved—Doctrine of antecedent debt not applicable.*] The question whether a debt is antecedent or not arises only when the father makes a transfer. It is the privilege of the father alone to burden the family estate by a mortgage for discharging an antecedent debt, which must be a debt of his own. A manager of the family, who is not the father, cannot bind the estate merely by discharging a pre-existing debt of the family.

S died leaving three sons, *RP*, *RS* and *Z*. *Z* then died leaving a son *C*, and the joint family then consisted of *RP*, *RS* and *C*. A mortgage of the joint family property was executed by *RP* and *RS*. *Held*, that in the absence of proof of legal necessity the mortgage was not binding on *C* or the family estate, even though the mortgage was made to pay off an earlier mortgage which had been executed by *S* and *Z*.

Chiranji Lal v. Bankey Lal, I. L. R., 55 All. ... 370

HINDU LAW—Legal necessity—Marriage of daughter born of a second marriage of a Hindu widow is not legal necessity justifying alienation of first husband's property 157

HINDU LAW—Marriage—Woman, after marriage, ceases to be a "kinswoman" of her father's family 487

HINDU LAW—*Remarriage of widow—Forfeiture of rights in her first husband's estate—Remarriage allowed by her caste—Custom of forfeiture not a legal incident of a custom of remarriage, but must be proved—Hindu Widows' Re-marriage Act (XV of 1856), section 2—Preamble.*] Section 2 of the Hindu Widows' Remarriage Act, XV of 1856, does not apply to the case of those widows who are entitled under the custom of their caste to remarry

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and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture, under the Act, of the widow's rights in the estate of her first husband on remarriage in such a case.

Also, there is no forfeiture, under the Hindu law itself, on remarriage in such a case. There is no express text which lays down that a forfeiture of the widow's estate will follow upon her remarriage. It is now well settled, according to the authoritative pronouncement made by the Privy Council upon an interpretation of the texts relating to the conditions attaching to inheritance by the Hindu widow, that she is not divested of her estate by living in unchastity. When open unchastity does not entail forfeiture, it would *prima facie* follow that a remarriage would not; for if according to strict Hindu law and orthodox Hindu religion a remarriage be invalid, it is then tantamount to unchastity. Further, the strict and orthodox Hindu law cannot logically be invoked, in order to furnish a rule of forfeiture on remarriage, applicable in the case of those castes which, in derogation of that strict and orthodox law, have recognized and permitted the remarriage of widows.

A custom of remarriage does not carry with it, as a legal incident thereof, a further custom of forfeiture upon remarriage. The proof of a mere custom of remarriage would not be sufficient to involve forfeiture, and it would be necessary for the party claiming that the widow's estate has been forfeited on account of remarriage to prove that there is a custom of such forfeiture in such a contingency.

Bhola Umar v. Kausilla, I. L. R., 55 All. 24

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II OF 1929), SECTION 2—*"Sister" does not include a half-sister.*] The word "sister" in section 2 of the Hindu Law of Inheritance (Amendment) Act, 1929, does not include a half-sister, either consanguine or uterine.

Ram Adhar v. Sudesra, I.L.R., 55 All. 725

HINDU WIDOWS' RE-MARRIAGE ACT (XV OF 1856), SECTION 2, *See* Hindu law 24

IDENTIFICATION—Mode of conducting identification 379

ILLEGAL ATTACHMENT—Right of private defence of property ... 617

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INCOME-TAX—*Other sources—Deduction—Expenditure—Expenditure not in year of assessment—Income-tax Act (XI of 1922), section 12, sub-section (2).*] An expenditure incurred by an assessee to income-tax is not a permissible deduction under section 12, sub-section (2), of the Indian Income-tax Act, 1922, unless it has been incurred in the year in respect of which arise the income, profits and gains forming the basis of the assessment.

Commissioner of Income-tax v. Basant Rai Takhat Singh, I. L. R., 55 All. 452

INCOME-TAX ACT (XI OF 1922), SECTION 12(2), *See* Income-tax ... 452

INCOME-TAX ACT (XI OF 1922), SECTIONS 22(4), 23(4), 30(1) PROVISO, 31—*Notice to produce account books—Whether such notice can be issued after the assessee has made a return—Appeal from assessment made under section 23(4)—Assistant Commissioner examining the record to satisfy himself that section 23(4) was applicable—Whether amounts to entertaining and deciding the*

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appeal.] It is open to an Income-tax Officer to issue a notice under section 22(4) of the Income-tax Act at any time after he has called upon the assessee to furnish a return, and even after a return has been furnished by the assessee. The failure of the assessee to comply with such a notice renders him liable to be assessed under section 23(4) of the Act.

In an appeal filed against an assessment made under section 23(4) the Assistant Commissioner is justified in so far examining the record as to satisfy himself whether the Income-tax Officer was right in proceeding to make an assessment under section 23(4), and, on being so satisfied, in rejecting the appeal on the ground that no appeal lay, according to the proviso to section 30(1) of the Act. Such procedure on the part of the Assistant Commissioner does not virtually amount to an order dismissing an appeal under section 31, and therefore the assessee has no right to approach the Commissioner to state a case.

In the matter of Pallumal Bholanath, I. L. R., 55 All. ... 804

INDIAN PENAL CODE, SECTIONS 23, 24—"Dishonestly"—Falsification of register with intent to conceal previous embezzlement ... 783

INDIAN PENAL CODE, SECTIONS 34, 302—*Death caused by one out of several persons having a common intention—Common intention to attack a party and prevent irrigation of field—One member, armed with a gun, of the attacking party causing death by shooting—Liability of other members.*] The view that section 34 of the Indian Penal Code applied only where a criminal act was done by several persons of whom the accused charged thereunder was one, and not where the act was done by a person other than the latter, is not a correct view. Section 34 is applicable equally to those cases in which the criminal act done in furtherance of a common intention of several persons is the act of a single individual. Of course, before section 34 can be applied, the prosecution must prove that the criminal act was done by one of the accused persons in furtherance of the common intention of all. The existence of a common intention is the sole test of the joint responsibility under section 34 of the Indian Penal Code.

Where a party of men set out towards a field, with the common intention of attacking another party of men and preventing them from irrigating the field from a well, and one of the attacking party had a gun and the others had *lathis*, and all of them attacked the other party with the result that two persons died of gunshot wounds and others received different injuries, it was *held* that section 34 of the Indian Penal Code applied and all the participants in the attack could be convicted under section 302 of murder.

Emperor *v.* Irshad Ullah Khan, I. L. R., 55 All. ... 607

INDIAN PENAL CODE, SECTION 71—Limit of punishment for offence made up of several offences 557

INDIAN PENAL CODE, SECTIONS 97, 99 AND 326—*Right of private defence of property against illegal attachment—Attachment of property under an invalid warrant—Does not amount to theft or robbery—"Good faith".*] Although an attachment of property made by an amin and his party under a time-expired warrant of attachment is illegal, such attachment does not amount to an offence of theft or robbery, there being no dishonest intention of causing wrongful gain or wrongful loss to any person; and no question of mischief or criminal trespass arises in such a case. Therefore, upon such attachment there is no right of private defence of property under the terms of section 97 of the Indian Penal Code.

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If, however, a right of private defence of property had accrued in such a case, it would not have been taken away by section 99 of the Indian Penal Code, as the amin, in acting under a time-expired warrant, could not be deemed to have acted "in good faith", as defined in the Indian Penal Code.

Where an amin with a party of constables, mukhia and patwari went to a village to make an attachment, but the warrant had become invalid by lapse of the time limited thereby, and the owner of the property resisted and caused grievous hurt to one of the party, it was *held* that he could not plead any right of private defence of property and was rightly convicted under section 326 of the Indian Penal Code.

Emperor *v.* Shib Lal, I. L. R., 55 All. 617

INDIAN PENAL CODE, SECTIONS 107, 108—Abetment, where the person abetted has no guilty intention but simulates it, *See* Indian Penal Code, section 161 with 116 654

INDIAN PENAL CODE, SECTION 121A—*Communist conspiracy to deprive the Queen of her sovereignty of British India—"The Queen", meaning of—General Clauses Act (X of 1897), section 3(23)—Conspiracy, evidence and proof of—Evidence Act (I of 1872), section 10—Criminal Procedure Code, sections 208, 210, 347—Power to commit without hearing whole of the prosecution evidence—Written statement by accused at sessions trial—Criminal Procedure Code, sections 256(2), 342—Examination of accused not to be lengthy cross-examination—Criminal Procedure Code, section 367—Judgment need not contain a résumé of the entire evidence—Criminal trial—Unnecessary multiplication of evidence—Sentence, considerations in adjudging—Evidence Act (I of 1872), section 45—Expert evidence as to identity of typewriter used for several documents—Evidence Act (I of 1872), section 11—Printed newspaper as evidence of the facts stated therein.*] In a trial under section 121A of the Indian Penal Code the accused persons were classifiable into four groups,—(1) members of the Communist Party of India; (2) members of the Communist Party of Great Britain; (3) professed Communists, but not members of any Communist Party; and (4) non-communists, who had been taking an active part and interest in Trade Union movements and in Workers and Peasants' Parties. It was *held* that (1) The members of the first group, who subscribed to and adopted the programme of the Communist International of Soviet Russia, had undoubtedly formed a revolutionary body with the professed object of overthrowing the present order of society and bringing about the complete independence of India by means of armed uprisings of the proletariat including the workers and peasants. This objective of theirs was not merely a distant aim to be realised in the unknown far off future, but was an immediate object, to be looked out for and realised whenever conditions became favourable, for which the preliminary spade work was to be carried on in the mean time. These persons were therefore guilty of having conspired to deprive His Majesty the King of his sovereignty of British India. (2) The members of the second group belonged to the Communist Party of Great Britain, which was a section of the Communist International, and had adopted the full programme of the latter. They were sent out to India for the express purpose of carrying out that programme, and in close association with the first group took part in various activities which were part of the programme. They were therefore, equally guilty. (3) Regarding the third group consisting of professed communists who, however, were not members of any Communist Party, no doubt the mere holding of communist beliefs or doctrines was not punishable *per se;* a theoretical communist or a student of communism could not be said to be guilty of

an offence. And if a communist were to work individually, in furtherance of his belief, he would not be guilty of conspiracy. Those persons in the third group, whose conduct and whose acts established in point of fact that they had conspired with the members of the Communist Party to carry out the same doctrines were guilty under section 121A. (4) The persons in the fourth group not only did not relong to any party committed by its constitution to adopting the programme of the Communist International, but were not even communists, believing in its doctrine of the inevitable use of force; they could not be presumed to have entered into a conspiracy with the communist accused for depriving His Majesty the King of his sovereignty of British India merely if they had taken part in Trade Union activities or had made seditious speeches. Although it is a part of the communist programme to form communist fractions who enter into other non-communist organisations like Workers and Peasants' Parties, Trade Unions etc., and try to influence the members and help in the dissemination of communist ideas, yet as such bodies are open to non-communists and there is nothing in their constitutions to show that they are communist organisations, the mere fact of the association of non-communists with communists in these organisations would not, without cogent evidence, justify an inference that they had all conspired together for the purpose of depriving His Majesty of his sovereignty of British India. In the case of such accused persons something more than taking part in such organisations or making seditious speeches would be required to prove the case of conspiracy beyond doubt.

Section 121A of the Indian Penal Code obviously drawa a distinction between the Sovereign for the time being of the United Kingdom and the Government of India or the Local Government. Any conspiracy to change the form of the Government of India or of any Local Government, even though it may amount to an offence under another section of the Code, would not be an offence under section 121A, unless it is a conspiracy to overawe such Government by means of criminal force, or show of criminal force.

Depriving His Majesty of the sovereignty of British India would obviously include the severance of the connection of India with the Imperial Government in England. Any conspiracy to establish the complete independence of India, as distinct from obtaining for it the status of a self-governing Dominion within the British Empire, would be tantamount to conspiring to deprive His Majesty of the sovereignty of British India. The same result would follow if there was a conspiracy to establish a perfectly democratic or republican form of government in India outside the British Empire.

The reference to "The Queen" in section 121A is not a reference to the personality of the Sovereign for the time being. No doubt section 18 of the Indian Penal Code defines "The Queen" as the Sovereign for the time being of the United Kingdom, but section 3(23) of the General Clauses Act provides that "The Queen" shall include her successors. For section 121A it is not necessary to establish that there is a conspiracy to deprive His Majesty the present King-Emperor of his sovereignty of British India, i.e., within the lifetime of the present King-Emperor; and the question whether the conspiracy is or is not expected or contemplated to succeed within the lifetime of the present King-Emperor is immaterial.

Sections 208 and 210 of the Criminal Procedure Code do not mean that once the Magistrate is satisfied that the prosecution has established a *prima facie* case and the accused should be committed to the court of session, he is still bound to take down all the remaining evidence for the prosecution;

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nor do they mean that if the Magistrate, after hearing part of the evidence of the accused, is satisfied that there is no case for commitment, he should nevertheless proceed to complete the recording of the entire evidence. The meaning is that if the Magistrate does not take all the evidence that the prosecution wishes to produce and discharges the accused under section 209, or does not take all the evidence offered by the accused and nevertheless commits the accused under section 213, the order would be illegal. Section 347 also indicates that it is not correct to say that the Magistrate has absolutely no option but to hear the entire evidence on both sides, and that he cannot commit the case unless he has done so. The proper procedure is that the prosecution can place before the court all the evidence on which they wish to rely, but after evidence has been taken which is sufficient to make out a *prima facie* case, it is not necessary to call further evidence. Similarly if there is a mass of evidence tending to prove the same point, it is not necessary that all such evidence should be produced in the Magistrate's court before the charge is framed. Notice of all evidence to be produced in the sessions court ought, however, to be given to the accused at the trial, otherwise he would be prejudiced.

Queen-Empress v. *Hayfield*, I. L. R., 14 All., 212, and *Queen-Empress* v. *Stanton*, I. L. R., 14 All., 521, not approved

At the stage of the preliminary inquiry into a case triable by the court of session, the prosecution should exercise a careful discrimination and make a proper selection of evidence so as to avoid unnecessary multiplication of evidence tending to establish the same point; much time can be saved thereby and the record is not unnecessarily overburdened. It is a matter for consideration by the legislature whether the procedure should not be further simplified so as to avoid duplication of trials.

Section 256(2) of the Criminal Procedure Code allows an accused to put in any written statement in the trial of a warrant case in the Magistrate's court. There appears to be no reason why, if the accused has already prepared a lengthy written statement, he should not be allowed to file it in the court of session. This would not of course relieve the court of the necessity of questioning him generally on the case in accordance with sections 342 and 364 of the Code. Much time of the court could be saved if such a written statement were accepted instead of allowing the accused to read it *in extenso* in court and to have it recorded as he reads it.

The questioning of the accused referred to in section 342 is not meant to be a lengthy cross-examination as regards all the evidence produced by the prosecution.

A judgment has not to be a résumé of the entire evidence or a discussion of the relevancy of all the evidence. A court is entitled to select such evidence as it considers important and sufficient to prove the point in issue. Much time would be saved if the Sessions Judge does not feel himself called upon to discuss in his judgment all the evidence produced by the prosecution and the defence.

A document, of which the writer is not known, found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents as against the other accused.

Copies of printed newspapers containing an account of some proceedings, found in the possession of one accused, are not by themselves evidence of the truth of the facts stated therein, unless in connection with other facts they make the existence or non-existence of the facts mentioned highly probable or improbable within the meaning of section 11 of the Evidence Act.

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The opinion of an expert that certain documents have been typewritten on the same machine is not admissible under section 45 of the Evidence Act which, as it stands, does not cover such expert opinion. The court may ask the witness to explain points in favour of his view, but must come to its own conclusion and not treat such opinion as expert opinion relevant by itself.

The theory of punishment is based upon (*a*) the protection of the public, (*b*) the prevention of crime and (*c*) the reformation of the offender. In the case of political offences, arising out of the beliefs of the accused, severe sentences defeat their object. In practice such sentences confirm the offenders in their beliefs and create other offenders, thus increasing the evil and the danger to the public.

Emperor *v.* Jhabwala, I. L. R., 55 All. 1040

INDIAN PENAL CODE, SECTIONS 142, 149—*Rioting with murder, dacoity and arson—Part played by each member not necessary to be proved—Evidence Act (I of 1872), section 106—Burden of proof—Intention—Criminal Procedure Code, sections 417, 418—Appeal against acquittal—Function of appellate court in such appeal—Criminal Procedure Code, section 162—"Refer to such writing".*] In a case of rioting with murder, dacoity and arson the prosecution is not called on to prove the part which each accused person took in the riot. The prosecution has to prove in the first place that there was an unlawful assembly and that the unlawful assembly committed various offences of riot, looting, arson and murder; and, further, that each accused person was a member of the unlawful assembly. Having proved so much, the provisions of section 149 of the Indian Penal Code apply, and every member of the unlawful assembly is guilty of offences committed in the prosecution of the common object of the unlawful assembly.

Section 142 of the Indian Penal Code shows that it is sufficient for the offence of riot to be proved against an individual that that individual should remain in an unlawful assembly as soon as he is aware that the assembly is unlawful. The word "continues" in the section merely means physical presence as a member of the unlawful assembly, that is, to be physically present in the crowd.

Also, under section 106 of the Evidence Act, if the defence in a case of riot is that a particular person was present among the rioters with an innocent intention, then the burden of proving that innocent intention lies upon the defence.

The functions of the High Court in an appeal by the Local Government against an acquittal by a Sessions Judge trying a case with assessors are not similar to the functions on a reference by a Sessions Judge who differs from the verdict of acquittal by a jury. In the case of such a reference, no doubt, the High Court has to see whether the verdict of the jury is perverse. But no such condition applies to section 418 of the Criminal Procedure Code; and what the High Court has to see is whether the offence charged is proved against each of the accused persons, having regard to the definition of "proved" given in the Evidence Act. *Queen-Empress* v. *Gayadin*, I. L. R., 4 All., 148 and *Queen-Empress* v. *Robinson*, I. L. R., 16 All., 212, overruled.

Section 162 of the Criminal Procedure Code applies both where the witness agrees with the previous statement recorded in the police diary and where he does not so agree. Where a witness is called and the statement to the police is made the subject of cross-examination, then according to this section the court should make a reference to that written statement and make a note on the record of what the written statement actually says.

Emperor *v.* Sheo Dayal, I. L. R., 55 All. 689

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INDIAN PENAL CODE, SECTION 161 WITH 116—*Abetment of taking illegal gratification by public officer—Public officer suggesting willingness to take a bribe—Intention not dishonest but merely to set a trap—Whether payment of the bribe in such circumstances is punishable—Indian Penal Code, sections* 107, 108—*Abetment, where the person abetted has no guilty intention but simulates it.*] While a suit was pending before a Subordinate Judge, he was approached by one *J* who told him that the plaintiff would give him Rs.10,000 if he would decree the suit. The Judge at once turned him out of the house. A few days later, one *M*, who was a *pujari* of the plaintiff, came to see the Judge at his house. The Judge had reason to suspect him to be an emissary of the plaintiff for the purpose of offering him a bribe; and with the intention of setting a trap for the man the Judge himself suggested his willingness to take a bribe, and an amount and a date were settled. On the date fixed *M* and *D*, the son of the plaintiff, came with the money and handed it over to the Judge, whereupon they were caught by certain officers who had been concealed in the house by the Judge. *J*, *D* and *M* were put on their trial under section 161/116 of the Indian Penal Code and all of them were acquitted by the Sessions Judge. On appeal by the Local Government, *Held*—

As *J* did not offer any bribe, nor was he or claimed to be an agent or representative of the plaintiff, his statement, or expression of opinion, that the plaintiff would be willing to offer a bribe did not amount to an abetment of the offence under section 161 of the Indian Penal Code, and he was rightly acquitted.

D and *M*, the bribe givers, were guilty of abetment of an offence under section 161, although they only complied with a demand made by the public servant, and although the public servant had no guilty intention of receiving the money as a bribe.

Explanation 3 of section 108 of the Indian Penal Code makes it clear that the person abetted need not have any guilty intention in committing the act, so the fact that the Judge took the money without any guilty intention was immaterial, so far as the offence of abetment was concerned. The Judge, in taking the money, did not commit an offence under section 161 and the bribe givers, therefore, did not aid the commission; but they aided the Judge to commit an act, i.e. to take the money, which would be an offence if committed with the same intention as that of the bribe givers. They were, therefore, guilty of abetment of an offence under section 161, the abetment being not by instigation or by conspiracy with the Judge, but by aiding him in the commission of the act of taking the money.

Explanation 3 of section 108 of the Indian Penal Code applies to abetment generally and there is nothing to indicate that it applies only to abetment by instigation and not to other kinds of abetment.

Emperor *v.* Chaube Dinkar Rao, I. L. R., 55 All. ... 654

INDIAN PENAL CODE, SECTION 186—*Obstructing public servant in making an attachment—Threats accompanied by show of physical force—Civil Procedure Code, order XXXVII, rule 5—Warrant of attachment before judgment not accompanied by notice to show cause or furnish security—Warrant illegal—Resistance thereto no offence.*] A commissioner appointed by a civil court to make an attachment before judgment went to the house of the defendant, accompanied by the plaintiff and his pairokars, to effect the attachment. The warrant of attachment, issued under order XXXVII, rule 5 of the Civil Procedure Code, neither contained nor was accompanied by a notice to the defendant to furnish security or to show cause against the attachment. When the party reached the defendant's house, he and his sons came out of the house armed with lathis; they adopted an offensive attitude and said they would never allow

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attachment to be made and would break the head of any one who should point out the property; and they removed some cattle. The commissioner, apprehending that an assault might be committed, retired.

Held that the action and attitude of the defendant and his sons amounted to obstructing a public servant, within the purview of section 186 of the Indian Penal Code, and "physical" obstruction was not necessary. Although mere threats by themselves would not in all cases amount to obstruction, they would so amount where they were accompanied either by an overt act or by a menacing attitude or show of physical force, e.g. the exhibition or flourishing of some kind of weapon capable of inflicting physical injury. *Emperor* v. *Ajiaz Hussain*, I. L. R., 38 All., 506, and *Asaq-Emperor* v. *Gopalbar*, 7 A. L. J., 1171, distinguished.

Held, further, that inasmuch as the warrant of attachment did not contain, nor even was accompanied by, a notice to the defendant to furnish security or to show cause against the attachment being made, the warrant was in contravention of order XXXVII, rule 5 and of Form No. 5 in Appendix F of the Civil Procedure Code, and was therefore illegal; and resistance or obstruction to the execution of the illegal warrant was not an offence under section 186 of the Indian Penal Code.

Emperor v. Tohfa, I. L. R., 55 All. 285

INDIAN PENAL CODE, SECTIONS 193, 199—False affidavit by accused person in support of his application for transfer—Prosecution for perjury 11a

INDIAN PENAL CODE, SECTION 225B—*Rescuing arrested person—Warrant of arrest not addressed to any person by name or designation—Arrest illegal—Civil Procedure Code, order XXI, rule 37—Simultaneous issue of notice and warrant—Warrant illegal.*] A warrant must be issued to some person for execution; where no name or designation of that person is given in the warrant, the warrant is defective and the arrest unlawful. The rescue of the person arrested under such warrant is no offence under section 225B of the Indian Penal Code.

Where a notice is issued under order XXI, rule 37 of the Civil Procedure Code a simultaneous issue of a warrant is illegal and an arrest thereunder is unlawful; in such a case the warrant can be issued, under clause (2) of the rule, only upon failure of the judgment-debtor to comply with the notice.

Emperor v. Fattu, I. L. R., 55 All. 109

INDIAN PENAL CODE, SECTION 304A—*Causing death by rash or negligent act—Motor lorry—Death due to collision with another lorry—Responsibility for the collision and not mere rash driving must be established*—Causa causans.] Accused was driving a motor lorry, which collided with another lorry coming in the opposite direction, with the result that a passenger on the accused's lorry was thrown out and died of the injuries. At that time another lorry was proceeding in front of the accused's lorry and a car had just passed the place; consequently a cloud of dust had gathered and visibility was very dim. The finding on the evidence was that the accused was driving too fast, considering the lack of visibility, and that this act of driving too fast was rash and negligent. There was no finding that the accused was responsible for the collision. *Held* that the conviction under section 304A of the Indian Penal Code could not stand. For a conviction under that section it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence; it must be the *causa causans*. In the present case the death was due to the collision, and unless it was found as a fact that the collision was entirely or mainly due to the act of the accused his conviction could not be sustained.

Emperor v. Sat Narain Pandey, I. L. R., 55 All. ... 263

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INDIAN PENAL CODE, SECTIONS 366A, 498—*Charge under former section, conviction under latter—Complaint by husband indispensable for such conviction—Criminal Procedure Code, sections* 199, 238—*Husband's giving evidence for prosecution under section* 366A *cannot take the place of a complaint by him under section* 498.] Where an accused is tried on a charge under section 366A of the Indian Penal Code he cannot be convicted of an offence under section 498 of the Code in the absence of a complaint made by the husband under that section. The fact that the husband appeared and gave evidence for the prosecution at the trial under section 366A cannot take the place of a complaint by the husband which is necessary.

Emperor *v.* Jagdamba Prasad, I. L. R., 55 All. ... 871

INDIAN PENAL CODE, SECTION 395—*Dacoity—Resistance or violence not a necessary ingredient.*] In a case of dacoity the circumstance that the inmates of the house, seeing the large number of the dacoits, do not offer any resistance and no force or violence is required or used does not reduce the dacoity to a theft.

Emperor *v.* Ram Chand, I. L. R., 55 All. 117

INDIAN PENAL CODE, SECTION 424—*Removal of crops attached in execution of decree—Warrant of attachment executed after the date on which it was returnable—Attachment invalid and removal no offence—Civil Procedure Code, order* XXI, *rule* 24(3).] The provisions of order XXI, rule 24(3) of the Civil Procedure Code are mandatory and where the process has a date fixed for its return under this rule it cannot be executed after that date. So, where property is attached after the date fixed for the return of the warrant of attachment, the property is not lawfully attached and the owner does not commit an offence under section 424 of the Indian Penal Code by removing the attached property from the possession of the custodian and taking it into his own use.

Emperor *v.* Gurdial, I. L. R., 55 All. 119

INDIAN PENAL CODE, SECTION 477A—*Falsification of register with intent to conceal previous embezzlement—"Intent to defraud"—"Dishonestly"—Indian Penal Code, sections* 23, 24.] The word "dishonestly" does not occur in section 477A of the Indian Penal Code, and all that is necessary to bring a person within the purview of that section is that he should have altered or falsified any book or paper, etc., wilfully and with intent to defraud.

The terms "fraud" and "defraud" are not defined in the Indian Penal Code, but it is clear that if the intention with which a false document is made is to conceal a fraudulent or dishonest act which had been previously committed, the intention cannot be other than an intention to defraud. The concealment of an already committed fraud is a fraud.

A document that is made with the intention of concealing a dishonest act already committed is made "dishonestly" within the meaning of section 24, read with section 23, of the Indian Penal Code as it facilitates the retention of the wrongful gain already made.

Making a false document with a view to prevent persons already defrauded from ascertaining that misappropriations had been committed, and thus to enable the person who committed the misappropriations to retain the wrongful gain which he had secured, amounts to the commission of a fraud and brings the case under section 477A of the Indian Penal Code.

Shuja-ud-din Ahmad v. *Emperor*, 20 A. L. J., 662, *Empress of India* v. *Jiwanand*, I. L. R., 5 All., 221, *Queen-Empress* v. *Girdhari Lal*, I. L. R., 8 All., 653, *Queen* v. *Lal Gumul*, 2 N.W. P.H.C.R., 11, and *Queen* v. *Jageshur Pershad*, 6 N.W.P.H.C.R., 56, dissented from.

Emperor *v.* Ragho Ram, I. L. R., 55 All. 783

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INDIAN PENAL CODE, SECTION 499—*Defamation—Publication—Reply to official notice issued by President of Notified Area—Defamatory allegations against President contained in the reply.*] A notice under section 185 of the Municipalities Act was issued by the President of a Notified Area to a certain person, who sent a reply containing defamatory allegations against the President. This reply was put on the official file by the President and it was read by the members of the Notified Area Committee. *Held*, there was publication of the defamation. The placing of the reply on the official file was not a gratuitous or a voluntary act on the part of the President but it was his duty to do so, and the accused knew or must have known that the contents of his reply would be necessarily communicated to the persons connected with the office of the Notified Area.

Queen-Empress v. *Taki Husain*, I. L. R., 7 All., 205, distinguished.

Emperor v. Sukhdeo, I. L. R., 55 All. 253

INSOLVENCY RULES FRAMED BY HIGH COURT, RULE 31—Notice to creditors of insolvency proceedings—Effect of a discharge without such notice 636

INTEREST—*Beneficiary under a deed of waqf entitled to interest against a mutwalli—Equitable jurisdiction to allow interest—Trusts Act (II of 1882), section 23(b).*] Where a mutwalli unreasonably delays the making of payment to a beneficiary under a deed of waqf, the beneficiary is entitled to receive interest from the mutwalli on equitable grounds.

Where a case, in England, would fall within the common law jurisdiction, no equitable principles are to be applied in awarding or withholding interest; but where a case would fall within the equitable jurisdiction exercised by the Court of Chancery, equitable considerations might induce the court to allow interest. A suit by a beneficiary, entitled under a deed of waqf to a certain share in the profits of zamindari property, against the mutwalli for accounts and recovery of the profits due would fall under the latter class and interest could be allowed on equitable grounds.

The position of a mutwalli, *qua* his duty to make certain payments enjoined by the deed of waqf, was that of a *quasi* trustee, and section 23 of the Indian Trusts Act would be a proper guide in deciding whether there were equitable grounds for allowing interest in this case, although the case did not fall within the Trusts Act.

Kishwar Jahan Begam v. Zafar Muhammad Khan, I. L. R., 55 All. 164

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LAND ACQUISITION ACT (I OF 1894), SECTIONS 23, 30—*Land formerly agricultural but since included within municipal limits and regarded as potential building site—Land occupied by occupancy tenants—Assessment of value of such land—Apportionment of compensation between landlord and tenants—Manual of Revenue Department, chapter XV, paragraphs* 467-474, 485, 491—*Agra Tenancy Act (Local Act III of* 1926), *section* 40.] On the question of apportionment, as between the landlord and the occupancy tenants, of the compensation awarded under the Land Acquisition Act in respect of a small plot of land, which was at one time purely agricultural land but was now to be regarded as a potential building site, being situated within the municipal limits of a city and adjoining a metalled public road having houses all along it,—

Held, by the Full Bench, that in the absence of definite evidence, the court may presume that the interests of the landlord and of the occupancy tenant, exclusive of specific amounts spent on extraordinary improvements of the land, are in the ratio of 10 to 6; but if there are other considerations or circumstances, that presumption may be rebutted.

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Held, also, that the market value of the land acquired, irrespective of any consideration as to how it is held by the various persons interested in it, e.g. whether the tenants occupying it have a right of transfer or not, should be first found out, and then the amount apportioned between the various claimants.

Per SULAIMAN, C.J.—The special provision contained in section 40 of the Agra Tenancy Act can be of no help in fixing the proportion of compensation payable where land is acquired by Government from both the landlord and the tenant.

The Board of Revenue have, in their Circulars, issued certain directions to Collectors, fixing maxima both for the amount to be awarded to the zamindar and the amount to be awarded to an occupancy tenant in the case of cultivable lands; but the method prescribed is not only a complicated one, but it is also difficult to see on what principles it is based.

Per MUKERJI, J.—There is no valid reason for making a distinction, as regards the method of apportionment, between land fit for building site and land fit only for agricultural purposes. The rules framed by the Board of Revenue for the assessment of the values of the interests of the tenant and the landlord in lands held and used for agricultural purposes are not binding on the civil courts.

Per KING, J.—In ordinary cases, where only the agricultural value of the land has to be considered, the question of apportionment between landlord and occupancy tenant does not arise. In such cases the sums payable as compensation to the landlord and to the tenant respectively are separately assessed by the Collector in accordance with paragraphs 467 A and 465 of chapter XV of the Manual of the Revenue Department. It is only in exceptional cases, where the land has a special value as a potential building site, that the question of apportionment arises, in such cases the assessment has to be made in a lump sum and both landlord and tenant are entitled to a share, as recognized in paragraph 491 of the Manual.

Shiam Lal v. Collector of Agra, I. L. R., 55 All. ... 897

LAND REVENUE ACT (LOCAL ACT III OF 1901), SECTIONS 40, 44—*Application for mutation by lessee rejected—Subsequent suit by him in revenue court for possession—Suit maintainable—Suit for declaration of title in civil court not necessary—Jurisdiction—Civil and revenue courts—Agra Tenancy Act (Local Act III of 1926), section 253—Revision—High Court can revise decree of Assistant Collector although confirmed in appeal by District Judge.*] Section 40 of the Land Revenue Act means that the order of the Collector regarding the entry of names in the annual register shall be final and shall not be challenged in any subsequent proceeding, but that it would not prevent the aggrieved party from establishing his right in a civil or revenue court having jurisdiction. It follows that if a suit for establishing such right lies in a revenue court and not in a civil court, his remedy would be to approach the revenue court, which would not be bound by the previous order refusing mutation of names. Similarly section 44 merely provides that all decisions under section 40 shall be binding on all revenue courts. The binding character of the decision means that the refusal to enter his name in the annual register can no longer be challenged by any revenue court.

So, where a lessee's application for mutation was rejected on his failure to produce any evidence, and then the lessee sued his landlord for possession in the revenue court, it was *held* that the plaintiff was not challenging the correctness of the mutation order, it being admitted by him that he was out of possession; and the revenue court had jurisdiction to give him a decree for possession notwithstanding the previous order, under section 40 of the Land

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Revenue Act, rejecting his application for mutation of names. It was not necessary for the plaintiff to go to the civil court for a declaration of title before he could maintain a suit for possession in the revenue court.

Held also, that the High Court had jurisdiction to revise the order of the Assistant Collector under section 253 of the Agra Tenancy Act when he had failed to exercise jurisdiction, even though an appeal had been preferred to the District Judge and dismissed by him.

Ramji Mal *v.* Devi Prasad, I. L. R., 55 All. ... 128

LANDLORD AND TENANT—*Abadi land*—Sahan darwaza *or courtyard outside the house of a raiyat—Raiyat's right to build on the* sahan darwaza *appurtenant to his house—Licence.*] A raiyat in a village abadi is not entitled to build as of right and without the consent of the zamindar on land which he has been using as an outer *sahan* or courtyard appurtenant to his house.

The question whether he has a right to build on any land appertaining to his house and not enclosed within it is one of fact to be determined on proof of the terms of the license, by direct evidence or by inference from the conduct of the parties and the use to which the land has been put.

Ratan Barhai *v.* Kishen Dei, I. L. R., 55 All. ... 204

"LEASE" OR "LICENSE"—Construction of document, *See* Stamp Act, section 2(16) and article 35(*a*)(iv) 874

LEGAL PRACTITIONERS ACT (XVIII OF 1879), SECTION 12—Contempt of court committed by a pleader in his personal capacity as a party—Disciplinary action 148

LEGAL PRACTITIONERS (FEES) ACT (XXI OF 1926), SECTIONS 3, 4, *See* Barrister and client 570

LETTERS PATENT, SECTIONS 10, 30—"*Judgment*"—*Order of remand—Appeal—Civil Procedure Code, section* 148; *order XLI, rule* 23—*Conditional order of remand, fixing a time for fulfilling the condition and in default the appeal to stand dismissed—Decree or order—Power to extend the time.*] An appeal lies under section 10 of the Letters Patent from an order of remand passed by a single Judge of the High Court under order XLI, rule 23 of the Civil Procedure Code. A final decision which effectually disposes of the appeal amounts to a "judgment" within the meaning of section 10 of the Letters Patent, whether it amounts to a "decree" or not. *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee*, 23 A. L. J., 555, explained and distinguished.

Where the lower appellate court remanded the suit on condition that the appellant should within one month file certain papers in the trial court, "and in case that is not done, the remand order shall not take effect and the appeal shall stand dismissed automatically upon a report being made by the court below that the order for filing the papers had not been complied with", and the condition was not complied with but an extension of time was prayed for, it was *held* that the order was not final and did not amount to a decree, and it was open to the court to extend the time.

Sital Din *v.* Anant Ram, I. L. R., 55 All. ... 326

LETTERS PATENT, SECTIONS 11, 35—Jurisdiction of High Court—Powers of local legislature to affect such jurisdiction 1008

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LIMITATION—Stipulation that in default of payment of six monthly interest the principal also would become due—Waiver ... 283

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LIMITATION ACT (IX OF 1908), SECTION 19—Acknowledgment—Application by judgment-debtor to file a letter of decree-holder agreeing to give time 393

LIMITATION ACT (IX OF 1908), SECTIONS 19, 20—*Payment in handwriting of debtor but without specifying whether towards interest or principal—Appropriation by creditor towards interest—Not payment of interest as such—Acknowledgment—Part payment, by itself, is not acknowledgment of the balance.*] It is an erroneous assumption that where interest is not paid as such, i.e. the debtor does not clearly mention that the payment made by him is to be appropriated towards interest, it should be considered to have been paid by him towards principal. A debtor may pay a certain amount in part satisfaction of what is due from him, without specifying that the sum is to be appropriated towards interest or principal; the creditor may, however, appropriate such payment towards interest, as he is entitled to do under section 61 of the Contract Act, but the payment cannot be considered to be the payment of interest as such, within the meaning of section 20 of the Limitation Act. Nor can it be considered to be payment in part satisfaction of the principal, as it has been lawfully appropriated by the creditor towards interest. Therefore, although the fact of the payment may appear in the handwriting of the debtor, limitation is not saved under section 20 of the Limitation Act.

Where a debtor pays a certain sum of money to his creditor, it cannot be said that such payment amounts to an acknowledgment under section 19 of the Limitation Act of liability for the balance which may be proved to be remaining due.

Ram Prasad *v.* Binaek Shukul, I. L. R., 55 All. ... 632

LIMITATION ACT (IX OF 1908), SECTION 20, PROVISO—*Part payment of principal—Acknowledgment of such payment in the handwriting of the debtor—Such acknowledgment need not be within limitation if the payment is within time.*] The part payment of the principal of a debt, made within the period of limitation, gives a fresh start to the period of limitation, provided an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment. But it is not necessary that the acknowledgment of the payment in the handwriting of the debtor should be made within the period of limitation. It is enough if the payment is made within the period of limitation and it does not matter that the acknowledgment in writing is made by the debtor after the expiry of the period of limitation.

Lal Singh *v.* Gulab Rai, I. L. R., 55 All. ... 280

LIMITATION ACT (IX OF 1908), ARTICLES 36, 115, 116, 120, *See* Companies Act, section 235 912

LIMITATION ACT (IX OF 1908), ARTICLES 62, 89—Suit for accounts between a principal and his commission agent ... 814

LIMITATION ACT (IX OF 1908), ARTICLE 83—*Part of purchase price left with vendee for payment to a creditor of vendor—Vendee's failure to pay and consequent payment by vendor—Suit to recover from vendee the amount left with him and interest—Limitation*—Terminus a quo.] A decree was sold for Rs.2,500 on the 1st of March, 1923, and the whole of the purchase money was left with the vendee for payment to a creditor who held a decree against the vendor. The vendee did not make the payment, and the vendor borrowed money from a third person on the 10th

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of December, 1926, and therewith discharged the decree of his creditor. The vendor then sued the vendee on the 9th of December, 1929, for recovery of the Rs.2,500 which had been left in deposit, together with interest thereon at 6 per cent. from the date of the sale. On the question of limitation, *held* that the suit was within time.

If a portion of the purchase money is left with a vendee for payment to a creditor of the vendor, and no time is fixed for payment, there is an implied agreement on the part of the vendee to pay the amount due to the creditor either forthwith or within a reasonable time. If the vendee commits a breach of this implied agreement and fails to pay, he is bound in law to indemnify the vendor for any damage sustained by the latter in consequence of the breach. The suit by a vendor in such cases, where he himself has had to pay the creditor, is not one for the return of the unpaid purchase money that the vendee failed to pay, but is one to enforce the implied contract of indemnity, the breach of which was committed by the vendee by failing to make the payment for which money had been left with him, and the suit comes within the purview of article 83 of the Limitation Act. The time for such a suit, which is one for damages, does not begin to run against the vendor till the damage has actually been suffered by him, i.e. till the date that he has made the payment to the creditor.

Raghubar Rai v. *Jaij Raj*, I. L. R., 34 All., 429, and *Ram Narain* v. *Nihal Singh*, 87 Indian Cases, 804, distinguished.

Onkar Singh v. Kashi Prasad, I. L. R., 55 All. ... 490

LIMITATION ACT (IX OF 1908), ARTICLES 142 AND 144—*Suit for possession of immovable property based on title—Defendant alleging ownership but not proving any title—Adverse possession—Burden of proof on defendant.*] Article 144 of the Limitation Act, and not article 142, is applicable when plaintiff sues for possession of immovable property on the basis of title; and where the plaintiff proves his title he is entitled to a decree unless the defendant succeeds in establishing his adverse possession for more than 12 years.

Where a purchaser of a house sued for possession on the allegation that the defendant was a tenant of the plaintiff's vendor, but the defendant alleged that he was the owner and denied that he ever was a tenant, but the defendant failed to prove any title, and on the other hand the plaintiff proved his title but did not prove any tenancy, it was *held* that the case came under article 144 of the Limitation Act and it was for the defendant to establish adverse possession for over 12 years and not for the plaintiff to prove that he or his predecessor in interest was in possession within 12 years preceding the suit.

Kallan v. Muhammad Nabi Khan, I. L. R., 55 All. ... 209

LIMITATION ACT (IX OF 1908), ARTICLE 182(5)—Certification by decree-holder of payment out of court is not an application to take a step in aid of execution 393

LIMITATION ACT (IX OF 1908), ARTICLE 182(5)—*Execution of decree—Successive applications—Limitation—Previous application alleged not bona fide.*] An application to execute a decree, or to take a step in execution, made in accordance with the Code of Civil Procedure, to the proper court, and within the time prescribed, operates under the Indian Limitation Act, 1908, article 182(5)—if made before January 1, 1928, when Act IX of 1927 came into force—to extend the time for executing the decree, whether or not the application was made with the genuine intention to proceed to execution.

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Kayastha Company, Ltd v. *Sita Ram Dube*, I. L. R., 52 All., 11, approved; *Shea Prasad* v. *Narain Das*, I. L. R., 48 All., 468, disapproved.

Khalil-ur-Rahman Khan *v.* Collector of Etah, I. L. R., 55 All. 139

MANUAL OF REVENUE DEPARTMENT, CHAPTER XV, PARAGRAPHS 467—74, 485, 491, *See* Land Acquisition Act, sections 23, 30 ... 897

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MEMORANDUM OF ASSOCIATION—Position of subscribers, *See* Companies Act, section 30 417

MINOR—*Ex parte* decree against minor owing to negligence of guardian *ad litem*—Remedies of minor 136

"MINOR"—Petition for divorce—Necessity of next friend, *See* Divorce Act, sections 3(5), 45, 49 243

MORTGAGE OF SHARES—Knowledge of managing director—How far company's lien on shares is affected thereby 810

MUHAMMADAN LAW—*Dower—Widow's lien for unpaid dower—Widow "lawfully" obtaining possession—Lien not dependent on consent of heirs to the widow's taking possession—Marriage—Legitimacy—What evidence admissible where direct proof of marriage not available—Evidence Act (I of 1872), sections, 2, 3, 32(5)—Practice and pleading—Suit by vendees to recover property from persons in possession—Vendors impleaded, but not raising question of consideration for the sale—Such plea not available to the defendants in possession.*] All that is necessary for a Muhammadan widow to be entitled to retain possession of her husband's estate until her dower debt is paid is that she should have obtained possession peacefully and not by force or fraud. Consent of the other heirs of the deceased husband to her taking possession of the estate is not a necessary condition of her right to retain possession until satisfaction of her dower debt.

Direct proof of the performance of a marriage ceremony, or of the acknowledgment by the father of the legitimacy of the issue, is not the only evidence by which a Muhammadan marriage or legitimacy of the children can be proved. By virtue of sections 2 and 3 of the Evidence Act, any evidence permissible by the Evidence Act, e.g., under section 32(5), can be used for the purpose of considering whether the fact of marriage or legitimacy is proved, notwithstanding any rule of Muhammadan law to the contrary.

Where the vendees of a certain property sued to recover the property from the persons in possession and impleaded the vendors also as defendants, and the vendors did not challenge the sale on the ground of consideration, it was *held* that the defendants in possession had no *locus standi* to challenge the consideration of the plaintiffs' sale deed, which was a question between the vendors and the vendees.

Zamin Ali v. Aziz-un-nissa, I. L. R., 55 All. ... 139

MUHAMMADAN LAW—Marriage—Legitimacy—What evidence admissible where direct proof of marriage not available 139

MUHAMMADAN LAW—*Restitution of conjugal rights—Prompt dower remaining unpaid after cohabitation—Suit for restitution not defeated thereby—Conditional decree—Power to impose condition of payment or other equitable or necessary conditions—Legal cruelty of husband—Discretion of court—Interpretation of Muhammadan law—Injunction claimed against wife's relations—Burden of proof.*] The absolute right of a Muhammadan wife to insist on the payment of the whole of the prompt portion of her dower

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before restitution of conjugal rights (except when the husband wants to take her out on a journey to another town) is lost after the consummation of the marriage, unless the consummation took place when she was a minor or of insane mind so as to be incapable of giving consent.

Although the observation of MAHMOOD, J., in the case of *Abdul Kadir* v. *Salima*, I. L. R., 8 All., 149, was an *obiter dictum*, founded upon a too closely applied analogy of sale of goods and upon a misconceived rule of interpretation of the Muhammadan law, and although texts and commentaries of ancient jurists of recognized authority could be cited in support of the opposite view, yet it would be dangerous now to go back upon the long course of decisions which throughout India, excluding Oudh, have accepted and followed that dictum, and thereby to unsettle the law by not adhering to the well recognized principle of *stare decisis*.

There is no absolute right in a husband to claim restitution of conjugal rights against his wife unconditionally; the courts have a discretion to make the decree conditional on the payment of her unpaid dower debt or to impose other suitable conditions considered just, fair and necessary in the circumstances of each case.

Under the Anglo-Muhammadan law as administered in this country a suit for the restitution of conjugal rights, though brought for the enforcement of a right under the Muhammadan law, is in the nature of a suit for specific performance, and there is accordingly a certain amount of discretion in the courts of justice which can impose a condition of previous payment of the dower debt or of a portion of it, in the decree.

In the particular circumstances of the present case a condition for previous payment of the dower debt was imposed, having regard to the considerations that the amount of the dower was not excessive or beyond the means of the plaintiff, that the defendant had obtained a decree for dower in spite of contest and the defendant, if compelled to go to live in the plaintiff's house, might find it very difficult to realise her decree which would thus become futile, that the plaintiff's suit was apparently by way of nullifying that decree, and that the plaintiff had been guilty of legal cruelty to the defendant.

Where it was established that the husband had been keeping a mistress in the same house with his wife and that, when quarrels ensued on that account, he treated his wife cruelly, the court, in a suit for restitution of conjugal rights, imposed the conditions that, unless the husband gave an undertaking not to keep any mistress in the house, a separate house should be provided for the wife, and two servants, of her choice, for her personal saftey should further be provided for her.

Where an injunction is claimed against the wife's relations, to whose house the wife had gone for protection and safety, the onus is on the plaintiff to prove that they are actually inducing the wife against going to her husband or preventing her from doing so; the mere fact that they gave shelter and protection to her cannot justify a decree for injunction against them.

It is not a general rule of interpreting the Muhammadan law that whenever there is a difference of opinion between Imam Abu Hanifa and his two disciples the opinion of a majority out of the three will prevail, or that the opinion of Imam Abu Hanifa will prevail over that of the disciples; there is no fixed rule of universal application in such cases. If one finds a question well threshed out and in later centuries a particular interpretation adopted by the leading doctors and text-book writers, it would not be proper now to go behind such a consensus of opinion and

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decide a point contrary to such opinion, on the ground that the majority of the three Imams favoured that view in the earlier centuries. Rules of preference were for the guidance of ancient jurists, and they are of no help when there is a clear preponderance of authority in support of one view. But if in any case the later jurists have not adopted in clear language any one of the conflicting opinions, but have merely stated the conflicting opinions without expressing any preference for either, then it is implied that the conflict of opinion was still continuing without any general concurrence having been attained, and it would then be open to choose whichever of the opinions appears to be the sounder and better adapted to the conditions and the needs of the times.

Anis Begam *v.* Muhammad Istafa Wali Khan, I. L. R., 55 All. 743

MUHAMMADAN LAW—*Wakf—Construction of wakfnama—Whether interest in property dedicated—Intention—Transfer of Property Act (IV of 1882), section 8.*] On August 29, 1912, a Sunni Muhammadan, who died a few days later, executed a deed by which he purported to sell two villages to his mother for Rs.2 lakhs; the deed stated that she had paid Rs.10,000 and that she was to apply the balance of the price to charitable purposes. By a wakfnama, executed by the vendee on June 23, 1913, she stated the terms of the sale and declared that she therefore made a wakf of the villages, subject to a charge in her favour for Rs.25,000, being the Rs.10,000 paid and Rs.15,000 already spent, and she appointed as mutwallis herself and, after her death, the respondents. A decree made in 1917 declared that the sale was invalid, and that the villages were divisible among the heirs of the vendor, his mother being entitled to a one-third share. She sold that share to the appellants. After her death one of the mutwallis claimed that the one-third share was wakf property and the sale invalid.

Held, that the claim failed because looking at the transaction as a whole the intention of the wakif was to dedicate only what she thought had been entrusted to her by her son for that purpose. Even if section 8 of the Transfer of Property Act, 1882, had any application to the case, it was excluded by the intention.

Sahu Har Prasad *v.* Fazal Ahmad, I. L. R., 55 All. ... 83

MUNICIPAL BYE-LAW—Requiring licence for sale of milk, *dahi* etc.—Whether *ultra vires* 538

MUNICIPALITIES ACT (LOCAL ACT II OF 1916), SECTIONS 2, 186—"*Building*"—Chabutra *with temporary awning or shed over it—Municipalities Act (Local Act II of 1916), section 307—Continuing breach—Daily fine imposed in anticipation at the time of first conviction.*] A masonry-work chabutra with a *pal* or shed over it, even though the latter may be of a temporary character, comes within the definition of a building in section 2 of the Municipalities Act. The putting up of a *pal* or shed, though not of a permanent character, on poles driven into a masonry-work chabutra amounts at least to "altering part of a building," if not to actually "erecting a building," within the purview of section 2.

A Magistrate, when convicting under section 307(2) of the Municipalities Act for non-compliance with a notice issued by the Municipal Board for the removal of a building, sentenced the accused to a fine of Rs.10 and to a further fine of Re.1 per day for such time as he might continue the breach. *Held*, that the order of daily fine, passed in anticipation of continuing breach, was illegal. Further proceedings had to be taken in case the breach was continued, and upon such second conviction a fine, calculated at the maximum rate of Rs.5 per day of the actual period of persistence in the breach, could be imposed.

Emperor *v.* Munshi Lal, I. L. R., 55 All. 603

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MUNICIPALITIES ACT (LOCAL ACT II OF 1916), SECTIONS 180(5), 185—*Construction of building before sanction—Notified Area—Whether section* 180, *clause* (5) *applicable to Notified Areas—Municipalities (Amendment) Act (Local Act II of* 1919), *sections* 14, 15—*Interpretation of statutes—When certain sections of an Act are made applicable, by the authority having power to do so, to a particular subject, whether subsequent amendments in those sections also become automatically applicable—Municipalities Act (Local Act II of* 1916), *section* 314—*Complaint under section* 185 *filed by President of Notified Area Committee, whose election as President was invalid—Jurisdiction.*] Inasmuch as the Local Government has not, in the exercise of the powers vested in it by section 338 of the Municipalities Act, II of 1916, extended to Notified Areas the provisions of the Municipalities (Amendment) Act of 1919, the amendments introduced by the latter Act do not apply to Notified Areas. Accordingly, clause (5) of section 180 of the Municipalities Act has no application to Notified Areas. Although section 180 was one of the sections made applicable to Notified Areas by Government notifications in June, 1917, the subsequent addition to that section made by the Act of 1919 did not *ipso facto* apply to Notified Areas.

So, where a person gave notice to the Notified Area Committee of his intention to make certain constructions, and commenced those constructions without having received either any sanction, conditional or unconditional, or any refusal from the Notified Area Committee, it was *held* that he could not be prosecuted under section 185 of the Municipalities Act.

Where the President of a Notified Area Committee was authorised by resolution to file prosecutions and complaints, and a complaint under section 185 of the Municipalities Act was filed by a person as President, whose election was subsequently held by a civil court to be invalid, it was *held* that the complaint not having been filed by an authorised person according to section 314 of the Municipalities Act, the Magistrate had no jurisdiction to try the case and the conviction was illegal.

Emperor *v.* Bafatan, I. L. R., 55 All. 845

MUNICIPALITIES ACT (LOCAL ACT II OF 1916), SECTIONS 241, 298 HEADING F(*a*), (*b*) AND (*d*)—*Bye-law requiring licence for sale of milk,* dahi *etc.*—Ultra vires—*Power to establish, regulate and inspect markets etc. does not include power to impose and levy licences.*] A bye-law framed by a Municipal Board prohibiting a shopkeeper from selling milk and *dahi* etc. without previously obtaining a licence from the Board is *ultra vires*.

Under section 298, clause (2), heading F(*d*) the Board has the power to provide for the establishment, regulation and inspection of markets, etc., and of places for the manufacture, preparation or sale of specified articles of food or drink, but this sub-clause does not speak of requiring or levying licences, and it would be doing violence to the language to hold that a power to make bye-laws for the above-mentioned purposes includes a power to make bye-laws requiring licences and levying fees for the sale of specified articles of food or drink. The power to make bye-laws regarding granting of licences is contained in section 241 and in sub-clauses (*a*) and (*b*) of heading F of section 298, but that is confined to the sale of meat, fish, fruits, and vegetables and does not apply to the sale of any other articles of food or drink.

Emperor *v.* Asa Ram., I. L. R., 55 All. 538

MUNICIPALITIES ACT (LOCAL ACT II OF 1916), SECTION 307—Daily fine imposed in anticipation at the time of first conviction ... 603

MUNICIPALITIES ACT (LOCAL ACT II OF 1916), SECTION 314—Complaint under section 185 of the Act filed by President of Notified Area Committee, whose election as President was invalid—Trial *ultra vires* 848

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MUNICIPALITIES ACT (LOCAL ACT II OF 1916), SECTION 326—*Not applicable to suits on contracts—Suit by contractor for payment for works done—Limitation.*] Section 326 of the Municipalities Act is intended to apply to suits in tort in respect of wrongful acts done by a Municipal Board or by officers or servants of that Board; and a suit based on contract is not contemplated by the section. So, a suit by a contractor for payment for works done does not come under section 326 and the limitation of six months, prescribed by clause (3) of that section, does not apply to such a suit.

A Municipal Board and its officers and servants are treated on the same footing as private individuals, when they enter into a contract. No special privilege accrues to them in making contracts and the law of limitation for contract suits is the same for them as for private individuals

Municipal Board, Agra *v.* Ram Kishan, I. L. R., 55 All. 1002

MUTWALLI—Whether a "Co-sharer", *See* Agra Tenancy Act, section 226 512

NOTICE—Mortgage of shares—Whether knowledge of managing director is notice to the company, *See* Company 810

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NOTIFIED AREAS—Whether clause (5) of section 180 of the Municipalities Act is applicable to Notified Areas 813

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OATHS ACT (X OF 1873), SECTIONS 9, 11—*Agreement to abide by the oath of the other party to be taken in a particular form Cannot resile from agreement—Contract Act (IX of 1872), sections 4, 5—Offer and acceptance—Revocation.*] The plaintiff made an offer in court, through his vakil, that if *S*, one of the defendants, made a statement on oath with Ganges water in his hand, the suit might be disposed of in accordance with that statement. The defendants' vakil accepted the offer on behalf of the defendants, including *S*, and stated that the defendants agreed to abide by the statement which *S* would make after taking oath in the proposed manner. The next day was fixed for the appearance of *S* for the purpose, but before any statement had been made the plaintiff applied to withdraw from the offer which he had made. *Held*, that the plaintiff's offer having been accepted by the other party and the acceptance having been communicated to the plaintiff, he could not thereafter revoke the offer; the agreement was a binding one, and the statement made by *S* after taking oath in the proposed manner was conclusive under section 11 of the Oaths Act.

Siya Ram Das *v.* Jagannath, I. L. R., 55 All. ... 298

ORDINANCE—*Prosecution started under Ordinance—Expiry of Ordinance before conclusion of trial—Whether prosecution can be continued after the expiry—Emergency Powers Ordinance (II of 1932), section 21—Special Powers Ordinance (X of 1932), section 17—General Clauses Act (X of 1897), sections 6, 30—Applicability to temporary Acts or Ordinances which expire automatically after a time—Criminal Law Amendment Act (XXIII of 1932), section 20—Criminal Procedure Code, sections 435, 439—Examining in revision, before conclusion of trial, whether the charge has been made out by the evidence.*] In March, 1932, a prosecution was started against the accused, and the Magistrate framed two charges, one under section 17 of the Special Powers Ordinance (No. X of 1932) read with section 21 of the Emergency Powers Ordinance (No. II of 1932) and section 80(2) of the Special Powers Ordinance, and the other under section 17(2) of the Criminal Law Amendment Act, 1908. Upon the framing of the charges

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the accused went up in revision, first to the Sessions Judge and then to the High Court, and obtained a stay of proceedings pending decision of the revision. By the time the revision came up for final hearing, both the Ordinances had expired.

Held, by the Full Bench, that the prosecution under the first charge could not continue after the expiry of the Ordinances and must be quashed.

An offence committed against an Ordinance or a temporary Act must be prosecuted and punished before the Ordinance or the temporary Act expires; and as soon as the Ordinance or temporary Act expires any proceedings which are being taken against a person will *ipso facto* terminate, unless any specific provisions are enacted for the continuance of such proceedings.

Section 6, read with section 30, of the General Clauses Act of 1897 provides for the continuance of proceedings in cases where an Act or an Ordinance is repealed by a subsequent Act or Ordinance; it has no application where a temporary Act or Ordinance has automatically expired.

Section 20 of the Criminal Law Amendment Act, 1932, has made express provision for the continuance of trials in respect of offences under certain specified sections only of the Special Powers Ordinance (No. X of 1932); section 17 or section 80(2) of that Ordinance is not included amongst the sections so specified. The legislature must be deemed to have intended that trials for offences under those sections of the Ordinance which are not specified in section 20 of the Criminal Law Amendment Act of 1932 should not be continued.

Held, also, with regard to the second charge, that at the stage at which the trial had reached, i.e. when only the evidence for the prosecution had been recorded and the charge framed, it would be very undesirable and inappropriate for the High Court to examine the evidence and decide whether the offence charged had been made out or not.

Emperor *v.* Bans Gopal, I. L. R., 55 All. 963

"PAST MEMBER"—A deceased member is not a "past member", *See* Companies Act, section 156 417

PERJURY—Accused person swearing false affidavit. *See* Indian Penal Code, sections 193, 199 114

POLICE ACT (V OF 1861), SECTION 30—*Public thoroughfare—Public park with paths across it—Whether the "park" as a whole is a "thoroughfare"*.] The accused and other persons convened a meeting to be held in a public park, whereupon the accused was served with an order under section 30 of the Police Act directing him to apply for a licence for holding the meeting in the park. The order having been disobeyed, the accused was convicted under section 32 of the Police Act. *Held*, in revision, that the order issued under section 30 was *ultra vires;* the order related to the park, and the park as a whole could not be deemed to be a public "thoroughfare", although there were paths in it, used by the public, which led to public roads. There might or might not be a public right of way through the park, but certainly the park was not intended to be exclusively used as a thoroughfare and this was not its chief or primary object. It was no doubt a public place, but section 30 of the Police Act did not refer to a "public place".

Emperor *v.* Parshottam Das Tandon, I. L. R., 55 All. ... 862

POWERS OF LOCAL LEGISLATURE TO AFFECT THE JURISDICTION AND POWERS OF THE HIGH COURT, *See* District Boards Act, sections 18, 19, 20 1008

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PRACTICE—Criminal revision in High Court—Previous application in revision to Sessions Judge or District Magistrate essential ... 261

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PRACTICE AND PLEADING—Plaint alleging legal necessity for loan in suit but not mentioning the pious obligation of sons—Whether plea of pious obligation can be raised 283

PRACTICE AND PLEADING—Suit by vendee to recover possession from third party—Vendor not challenging consideration for the sale—Defendant cannot raise such question 139

PRE-EMPTION—*Customary law—Preferential rights—Kumaun customs—"Kinsman" whether includes kinswoman—Married girl is not a kinswoman of her father's family—"Relatives of vendor within the third degree"—Such relationship with vendor's husband not sufficient.*] A Hindu widow in Kumaun sold the property inherited from her husband, and a suit for pre-emption was brought by a married daughter of the brother of the vendor's husband. According to the customary law of pre-emption in the Kumaun Division, as recorded in Stowell's Land Tenure of Kumaun Division, a "kinsman" of the vendor, and a "relative of the vendor within the third degree", have preferential claims. The plaintiff claimed to be entitled to pre-empt on either ground. *Held*, that (1) apart from the question whether the word "kinsman" did or did not include a kinswoman, it was clear that the plaintiff by her marriage had gone out of the family and ceased to be a kinswoman of the vendor; and (2) that the plaintiff and the vendor not having descended from a common ancestor, the plaintiff could not come under the category of a relative of the vendor within the third degree. The plaintiff was, no doubt, a relative within the third degree of the vendor's husband, but that did not satisfy the condition.

Bachauli *v.* Udai Singh, I. L. R., 55 All. 187

PRE-EMPTION—*Joint Hindu family—Sale by adult members—Whether a minor member entitled to pre-empt—Consent—Estoppel—Questioning validity of the sale in pre-emption suit.*] On a sale of joint family property by the adult members of a joint Hindu family a minor member of the family brought a suit to pre-empt the sale. *Held*, that the suit did not lie; the principle of estoppel applied to the suit, inasmuch as a person in the position of a vendor could not pre-empt his own sale.

In a joint Hindu family the *karta* can and does act in the interest of the entire family, and in such a case the fact that no consent could be given by the minor himself is immaterial.

In a suit for pre-emption the validity of the sale cannot be challenged; it has to be taken as a valid and good sale, because the suit for pre-emption is a suit for substitution only; and if the sale is valid and binding on the minor member, he cannot claim to pre-empt it, his position being that of a vendor.

Ram Singh *v.* Deo Narain, I. L. R., 55 All. 972

PRINCIPAL AND AGENT—Notice to agent, *See* Company 810

PRIVILEGE—Doctors' evidence not privileged 134

PRIVY COUNCIL RULES, 1920, RULE 9—Deposit of translation, etc. charges—Power to extend time beyond the statutory period for such deposit 432

PROVINCIAL INSOLVENCY ACT (V OF 1920), SECTIONS 27, 43, 75—*Time specified within which to apply for discharge—Power to extend time even after expiry thereof—Revision of order under Provincial Insolvency Act.*] Where an order of adjudication under the Provincial Insolvency Act has been made and a time has been fixed within which the insolvent has to apply for his discharge, the court has power to extend the time even after the expiry of the period originally fixed.

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Where an appellate order passed in insolvency proceedings was sought to be revised under section 115 of the Civil Procedure Code, it was *held* that the proper section under which to entertain the petition was section 75 of the Provincial Insolvency Act.

Madho Prasad Vyas *v.* Madho Prasad, I. L. R., 55 All. ... 241

PROVINCIAL INSOLVENCY ACT (V OF 1920), SECTION 28—*Vesting of insolvent's property in receiver—Transfer (mortgage) by undischarged insolvent of property which had vested in receiver—Whether void or only voidable—Mortgaged property re-vesting in insolvent after his discharge—Mortgage enforceable—Transfer of Property Act (IV of 1882), section 43.*] An alienation by an undischarged insolvent of property belonging to him is not altogether void but only voidable at the option of the receiver. The effect of an order of adjudication is, no doubt, to vest the property of the insolvent which belonged to him, or which he acquires while the order of adjudication is in force, in the receiver, but that does not mean that an alienation by the insolvent is wholly void and cannot be enforced against him after an order of discharge has been passed and the property has been divested from the receiver and re-vested in the insolvent. A distinction must be drawn between cases in which because of a statutory prohibition a person is incompetent to contract or to transfer his property, and cases where the person entering into a contract or transferring his property is under no such disability. Notwithstanding the order of adjudication an insolvent is not incompetent to enter into a contract and there is no statutory provision prohibiting an insolvent from transferring his property.

So where, after a person was adjudicated an insolvent certain property was gifted to him and he executed a mortgage thereof, but the receiver did not raise any objection and did not himself deal with the property, and after an order of discharge had been passed the mortgagee sued to enforce the mortgage, it was *held* that the mortgage was not void and could be enforced, and that section 43 of the Transfer of Property Act applied.

Rup Narain Singh *v.* Har Gopal Tewari, I. L. R., 55 All. 503

PROVINCIAL INSOLVENCY ACT (V OF 1920), SECTION 44(2)—*Effect of discharge, as against a creditor without notice of the insolvency proceedings—Insolvency Rules framed by High Court, rule 34—Proclamation of insolvency proceedings—Notice.*] The rule of law enacted by section 44(2) of the Provincial Insolvency Act, namely that an order of discharge shall release the insolvent from all debts provable under the Act, is not qualified by any rule that the creditor should have notice of the proceedings. The rule is based on a policy of law and not on any rule of constructive notice. Where no question of fraud is involved, the fact that a creditor had no notice of the insolvency proceedings does not prevent the operation of section 44(2) as against him, and the order of discharge releases the insolvent from the debt provable under the Act which was due to the creditor.

It may be desirable, in the interests of justice, that the rules should provide for some advertisement or proclamation of insolvency proceedings.

Kundan Lal *v.* Nathu, I. L. R., 55 All. ... 686

PUBLIC POLICY, *See* Barrister and client 570

PUBLIC POLICY. *See* Companies Act, sections 235, 280 250

RAILWAYS ACT (IX OF 1890), SECTION 72—*Risk-note Form B—"Misconduct"—Wrong consignment number entered in railway receipt—Right of consignee to "open delivery"— Delay in making delivery—Loss caused by prices falling during such delay—*

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Liability of railway.] A consignment of ghee was marked as No. 93, but by some mistake of the railway clerk the number entered in the railway receipt was 23. When the consignee went to take delivery he was offered the canisters marked No. 93, but as the number did not tally with that entered on the railway receipt he was doubtful whether these were the right goods, and demanded an "open delivery", i.e. that the canisters should be opened and their contents examined by him before accepting delivery. As it was beyond the authority of the local railway officials to give an "open delivery" they transmitted the consignee's request to higher authorities, and after some days a higher official arrived and gave the open delivery, and the contents were found to be right. During this interval, however, the market prices of ghee had gone down considerably, and the consignee sued the railway for damages for the loss resulting from this fall in prices. The question arose whether the railway was protected against such a claim by the terms of risk-note Form B, under which the consignment had been booked.

Held, that the loss complained of by the plaintiff was not covered by the indemnity clause in risk-note Form B. The clause in question protects the railway administration against a claim for damages arising out of loss or destruction or deterioration of, or damage to, the goods, and cannot be applicable to a case where the claimant is damnified, not by loss, destruction or deterioration of the goods themselves, but by some act of the railway administration or its employees not affecting the condition of the consignment or the goods consigned.

Held, also, that in the circumstances the plaintiff was entitled to insist on an open delivery, before giving a discharge to the railway administration, and the responsibility for the delay in delivery was not his, but that of the railway administration.

Held, further, that want of proper care and caution may amount to "misconduct" within the meaning of risk-note Form B. A mistake in the preparation of the railway receipt, which throws doubt on the identity of the consignment to which it relates, is a misconduct in the above sense.

Secretary of State for India in Council *v.* Madhuri Das Narain Das, I. L. R., 55 All. 625

REDEMPTION—*Usufructuary mortgage—Subsequent loans—Further charge—Stipulation that subsequent loan must be paid before redemption of mortgage—Redemption by purchaser from some of the mortgagors—Integrity of mortgage being broken.*] Certain zamindari property, owned by the descendants of seven brothers, was usufructuarily mortgaged by them in 1883 to *H* for Rs.600. In 1884 the descendants of one of the brothers borrowed Rs.99 from *H* on an unregistered bond, containing the stipulations (1) that the amount of the bond with interest would be paid first, when redeeming the mortgage of 1883, and then the amount due under that mortgage; and (2) that until the principal and interest of the bond were paid, the executants thereof would not mortgage or sell the aforesaid zamindari property. Three other similar bonds were executed in 1884 and 1885, for sums of money borrowed from *H*, by the descendants, respectively, of three other brothers. After the first three bonds were executed, the integrity of the mortgage of 1883 was broken, by reason of the mortgagee having purchased a share of the mortgaged property. Subsequently a suit for the redemption of the mortgage of 1883 was brought by the plaintiff, who had purchased shares of the descendants of four of the brothers, and the question was whether they must also pay the amounts under the four bonds, and if so, to what extent.

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Held that the four bonds created further charges on the property mortgaged in 1883. The stipulation in each subsequent bond that the executants should pay the amount due on that bond before they redeemed the original prior mortgage was an agreement to create a charge on the property previously mortgaged: *Aditya Prasad* v. *Ram Ratan Lal*, I. L. R., 5 Luck., 365, followed. In addition, there was the further stipulation on the part of the executants that they would not mortgage or sell the property previously mortgaged till the money due on the subsequently executed bond had been paid; and this meant that the previously mortgaged property was made security for the payment of the money subsequently borrowed.

The integrity of the mortgage having been broken, the representatives in interest of each one of the seven brothers were entitled to redeem only their particular share of the mortgaged property on payment of one-seventh of Rs.600, together with the amount due on the subsequent bond, if any, executed by those representatives; and the plaintiff's rights and obligations were to be calculated on this basis.

Jagannath Kunwar *v.* Jaipal, I. L. R., 55 All. ... 359

REPRESENTATIVE SUIT—Withdrawal application by plaintiff—Right of other interested persons to intervene and continue the suit ... 825

RESTITUTION OF CONJUGAL RIGHTS—Injunction claimed against wife's relations—Burden of proof 743

RESTITUTION OF CONJUGAL RIGHTS—Muhammadan law—Power to impose conditions in decree of payment of prompt dower and other equitable or necessary conditions 743

RISK-NOTE FORM B—Interpretation of indemnity clause—"Misconduct"—Wrong consignment number entered in railway receipt—Delay in making delivery 625

RULES OF HIGH COURT, CHAPTER XVII, RULE 1(*b*)—Security for costs of appeal to Privy Council—May be in the form of immovable property 246

SEARCH-WITNESS—*Should himself be searched first—Constables and others raiding a house and finding illicit liquor, opium and ammunition—Evidence liable to be discounted by failure to have themselves searched—Indian Penal Code, section 71—Limit of punishment for offence made up of several offences—United Provinces Excise Act (Local Act IV of 1910), section 60, clauses (a), (b) and (f).*] On receipt of information that illicit liquor was being manufactured in a certain house, the police conducted a raid upon the house. Implements for manufacturing liquor and liquor in various stages of manufacture were found; also, about one ounce of crude opium and six revolver cartridges were found. No search of the constables and the search-witnesses had been carried out before entering the house. The owner of the house was convicted, and separately sentenced, under section 60(*a*) of the U. P. Excise Act, section 60(*b*) and (*f*) of the same Act, section 9(*c*) of the Opium Act, and section 19 of the Arms Act.

Held that the fact that a search of the constables and of the search-witnesses had not been carried out before entering the house was enough to throw doubt upon that part of the case which related to the discovery of the opium and the cartridges, which were of such small quantity and bulk that it would be a simple matter for any one to take them into the house. The rule as to such search ought never to be neglected. Where an informer, as in these cases under the Excise Act, obtains a substantial reward for information leading to a conviction, there is a very great temptation for him, acting in conjunction with the police constables, to plant in the house of a suspected person excisable articles in order that he

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may obtain the reward. Every one engaged in a raid of this sort must be searched to see that there is no excisable article upon him, and failure to carry out this rule must give to the defence a very strong argument against conviction.

Held, also, that when a man was found guilty of the major offence of illicitly manufacturing excisable articles, it was unreasonable that he should also be severely punished for keeping in his possession materials for manufacturing those articles and for possessing such articles. The one offence included all the others; and having regard to section 71 of the Indian Penal Code, a sentence under section 60(*b*) of the Excise Act should be passed and the separate sentences under section 60(*a*) and (*f*) should be set aside.

Emperor *v.* Mahmud Ali Khan, I. L. R., 55 All. ... 557

SECURITY BOND—Filed by a party for obtaining a temporary injunction—Mode of enforcement of security—Separate suit or execution 346

SENTENCE, CONSIDERATIONS IN ADJUDICATING, *See* Indian Penal Code, section 121A 1040

SPECIFIC RELIEF ACT (I OF 1877) SECTIONS 39, 42, *See* Court Fees Act, schedule II, article 17(iii) 791

SPECIFIC RELIEF ACT (I OF 1877), SECTION 42—*Suit for a negative declaration—Declaration that defendant is not entitled to restrain plaintiff from using a particular trade mark, although plaintiff does not claim it as his property—"Right to property"—Suit brought as counterblast to criminal charge by defendant of using false trade mark—Declaratory relief discretionary.*] The defendant brought a criminal charge, under sections 482 and 486 of the Indian Penal Code, against the plaintiffs of having counterfeited and used his trade mark on *biris* (cigarettes) manufactured and sold by them. Thereupon the plaintiffs brought a suit for a declaration that they were entitled to use that particular mark and the defendant had no right to restrain them from doing so. The plaintiffs' case was that neither they, nor the defendant, nor any one else had an exclusive right to the use of that mark, and the defendant's case was that it was his exclusive trade mark. The question was whether such a suit was maintainable and whether such a relief should be granted.

Per RACHHPAL SINGH, J.—As no exclusive right of property was claimed by the plaintiffs in the particular mark, the defendant had not infringed any "property right" of the plaintiffs and the negative declaration sought by the plaintiffs should, in the exercise of the discretion of the court dealing with declaratory suits, be refused. Moreover, the result of entertaining a suit of this description, filed on the heels of the criminal charge brought against the plaintiffs, would be to render the provisions of the Indian Penal Code nugatory and prevent the owners of trade marks from seeking relief in any but a civil court, although they have a choice of two remedies open to them.

Per NIAMAT-ULLAH, J.—Ordinarily there can be no objection to a plaintiff seeking a declaration which negatives the defendant's right and in so doing affirms some right claimed by the plaintiff; a cloud is removed from the plaintiff's own title when the defendant's alleged right is negatived. The position is not materially different where the right claimed by the defendant adversely affects the plaintiff's position in common with that of others similarly situated. Where the effect of negativing a right claimed by the defendant is to directly or indirectly affirm a right claimed by the plaintiff in common with others, a suit for a declaration that the defendant does not possess such right is maintainable.

Not only is the monopoly enjoyed by the proprietor of a trade mark a "right to property", but the *liberty* to use a particular trade mark is equally a "right to property".

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Having regard to the circumstances that the object of the suit was to stay or to influence the decision of the criminal case, that the suit was not a representative one framed under order I, rule 8 of the Civil Procedure Code, and that the criminal case having ended in an acquittal no immediate necessity existed for the relief sought, the declaration should, in the exercise of discretion, be refused.

Ganeshi Lal *v.* Anwar Khan Mahboob Co., I. L. R., 55 All. 702

STAMP ACT (II OF 1899), SECTION 2(16) AND ARTICLE 35(*a*)(iv)—*"Lease"—Undertaking in writing to occupy immovable property—Construction of document—Lease or license—Whether exclusive possession and enjoyment given.*] Under a bilateral agreement in writing, called an agreement of license, between the Secretary of State for India and the Burmah Shell Oil Storage Company the company was to have the use and occupation of certain railway land belonging to the State, for the purpose of constructing a petroleum storage installation. The company had to pay a certain amount monthly for the use of the plot, without any right of transfer or subletting. The company was to erect certain substantial constructions of a permanent character on the land, and allow certain officials of the railway access to the land at any time for inspection of the condition of the buildings. In case of breach of any of the conditions by the company the "license" could be determined by giving seven days' notice; also either party was at liberty to determine it by giving three months' notice at any time. The deed expressly provided that nothing contained in it should be construed to create a tenancy. The question arose whether the deed was chargeable with stamp duty as a lease or was exempt from stamp duty as creating a mere license.

Held that the document in question was a lease within the definition in section 2(16), clause (*b*) of the Stamp Act, as it was an undertaking in writing to occupy immovable property and was not a counterpart of a lease, and was therefore chargeable with stamp duty under article 35(*a*)(*iv*) of schedule I of the Stamp Act.

The definition of "lease" as contained in the Stamp Act is wider and more comprehensive than the definition in the Transfer of Property Act and includes transactions which may not amount to a lease under the latter Act.

Per SULAIMAN, C. J.—So long as the transaction remained in force the Oil Company had exclusive possession and enjoyment of the land, the only restriction being that it was bound to allow the railway officers to inspect the premises. This was obvious from the fact that the company was to put up a substantial building of a permanent character, and after the construction of the building the actual possession of the land could not remain with the railway administration, only their officer was allowed access for purposes of inspection. The transaction, therefore, was not a mere license as defined in section 52 of the Easements Act, as a license does not confer exclusive possession and enjoyment. The document, therefore, was not exempt from stamp duty as being a license.

Per MUKERJI, J.—If the document comes within the definition of the word "lease" contained in the Stamp Act, it must be held chargeable with stamp duty as a lease, although it may also be held that the transaction would be a license within the meaning of section 52 of the Easements Act.

In the matter of Burmah Shell Oil Storage and Distributing Company of India, Limited, I. L. R., 55 All. ... 874

STAMP ACT (II OF 1899), SECTION 5 AND ARTICLE 62(*c*)—*Transfer by one deed of the interests secured by several bonds—Consideration a single sum without any apportionment—Stamp duty chargeable—"Distinct matters"—General Clauses Act (X of 1897),*

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section 13—*Whether applicable to Stamp Act, article* 62(*c*).] A person, who was the obligee of each of 29 bonds and mortgage deeds executed by different persons in his favour, transferred his interest in all these bonds and mortgage deeds to another person by executing one instrument comprising them all; the consideration was one lump sum, without any specification or apportionment as between the several items. On the question of the proper stamp duty payable,—

Held (NIAMAT-ULLAH and BENNET, JJ., dissenting) that section 5 of the Stamp Act, dealing with instruments comprising or relating to several distinct matters, did not apply to the case, and that under article 62(*c*) of the Stamp Act, read with section 13 of the General Clauses Act, the stamp duty chargeable on the deed in question was Rs.5.

[*Per* NIAMAT-ULLAH, J.:—Section 5 of the Stamp Act does not apply to the case; but under article 62(*c*) itself the proper stamp duty payable is the sum of all the duties paid on the bonds and mortgage deeds, subject to the maximum of Rs.5 for any one bond or deed. The application of section 13 of the General Clauses Act to give any other interpretation would lead to serious difficulties.]

[*Per* BENNET, J.:—Section 5, and article 62(*a*), each applies to the case, with the same result, namely that the proper duty on the instrument in question is the aggregate of the amounts of duty payable on each of the 29 transfers contained in the instrument. The application of section 13 of the General Clauses Act would be repugnant to the subject. Where a schedule laying down a scale of charges does not expressly provide for the same charge to apply to a number of articles and to one only, the result should not be obtained by the introduction of a rule of interpretation that the singular includes the plural.]

Ram Sarup v. Toti, I. L. R., 55 All. 468

STAY OF EXECUTION OF FINAL DECREE PENDING DECISION OF APPEAL FROM PRELIMINARY DECREE, *See* Civil Procedure Code, order XLI, rule 6(2) 983

SUITS VALUATION ACT (VII OF 1887), SECTION 11—Undervaluation—Suit decided by court of inferior jurisdiction—Whether disposal on the merits prejudicially affected thereby 315

SURETY—Discharge according to terms of security bond, although terms not in accordance with Code 548

THIRD APPEAL, TO HIGH COURT, *See* Agra Tenancy Act, section 246... 356

"THOROUGHFARE"—Whether a public park is a thoroughfare, *See* Police Act, section 30 862

TRADE-MARK—"Right to property", *See* Specific Relief Act, section 42 702

TRANSFER BY UNDISCHARGED INSOLVENT, *See* Provincial Insolvency Act, section 28 553

TRANSFER OF PROPERTY ACT (IV OF 1882), SECTION 3—Actionable claim—Right to recover unliquidated damages on breach of a contract ... 814

TRANSFER OF PROPERTY ACT (IV OF 1882), SECTION 6(*e*)—*Mere right to sue—Assignment of right to damages on breach of contract—Transfer of Property Act* (*IV of* 1882), *section* 3—*Actionable claim—Right to recover unliquidated damages is not an actionable claim—Limitation Act* (*IX of* 1908), *articles* 62, 89.] An actionable claim means a claim to a debt, which, in its primary sense, is a liquidated money obligation, and it is an essential feature of an action for debt that it should be for a liquidated or a certain sum of money. According to the definition of an actionable claim, as contained in section 3 of the Transfer of Property Act, the right to recover an unascertained amount of damages resulting from a breach of contract is not an actionable claim but a mere right to sue, which cannot be transferred because of the provisions of section 6(*e*) of the Transfer of Property Act.

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Article 62 of the Limitation Act can apply only to cases where a definite sum of money had been received by the defendant and which he was to hold for the use of the plaintiff. Article 89, and not article 62, applies to a suit for accounts between a principal and his commission agent in respect of transactions conducted by the latter on behalf of the former.

Moti Lal *v.* Radhey Lal, I. L. R., 55 All. 814

TRANSFER OF PROPERTY ACT (IV OF 1882), SECTION 8. *See* Muhammadan law—Wakf 83

TRANSFER OF PROPERTY ACT (IV OF 1882), SECTION 41—*Transfer by ostensible owner—Estoppel against real owner and persons claiming under him—Hindu daughter allowing another person to be in possession of her estate as ostensible owner—No estoppel against reversioners—Adverse possession—Adverse possession against limited owner whether adverse possession against the reversioners.*] A Hindu daughter succeeded to her father's estate, but she allowed her uncle's name to be entered in the revenue papers in respect of the estate and the uncle took possession. Subsequently the uncle, as ostensible owner, transferred a part of the estate to the defendants. Later on, the daughter died; and within twelve years of her death her sons sued to recover possession from the defendants. *Held* that the plaintiffs were not estopped under section 41 of the Transfer of Property Act from claiming the property. Section 41 of the Transfer of Property Act refers to personal estoppels arising out of the conduct of the real owner and affecting him and persons claiming through him. The plaintiffs, who were reversioners, did not derive their title from the daughter and, therefore, section 41 could not apply to them. The mere fact that the estate was vested in the limited owner for the time being could not create an estoppel against the reversioners by virtue of the conduct of, or consent obtained from, the limited owner.

Held, further, that during the lifetime of the limited owner the possession of the uncle or of his transferees could not be adverse to the reversioners so as to destroy their contingent rights. The plaintiffs' cause of action arose on the death of the limited owner, and the suit brought within twelve years of the death was not barred by limitation.

Shambhu Prasad *v.* Mahadeo Prasad, I. L. R., 55 All. 554

TRANSFER OF PROPERTY ACT (IV OF 1882), SECTION 43—Mortgage by undischarged insolvent of property which re-vested in him after his discharge, *See* PROVINCIAL INSOLVENCY ACT, section 28 ... 503

TRANSFER OF PROPERTY ACT (IV OF 1882), SECTION 52—Affected by doctrine of election, *See* Election 735

TRANSFER OF PROPERTY ACT (IV OF 1882), SECTION 52—*Pendente lite* transfer by mortgagor—Execution of decree against the transferee 235

TRUSTS ACT (II OF 1882), SECTION 23(*b*). *See* Interest ... 164

U. P. EXCISE ACT (LOCAL ACT IV OF 1910), SECTION 60, CLAUSES (*a*) (*b*) AND (*f*)—Sentences, *See* Indian Penal Code, section 71 ... 557

U. P. TOWN IMPROVEMENT (APPEALS) ACT (LOCAL ACT III OF 1920), SECTION 3(*a*)—*U. P. Town Improvement Act* (*Local Act VIII of* 1919), *section* 64(1) (*b*)—Ex parte *order by President of the Tribunal apportioning compensation—Order refusing to set aside the* ex parte *order—Not appealable.*] Under section 3(*a*) of the U. P. Town Improvement (Appeals) Act, 1920, an appeal is provided from an order deciding a question of apportionment of compensation, passed by the President of the Tribunal under section 64(1) (*b*) of the U. P. Town Improvement Act, 1919; but where such an order is passed *ex parte* and an application for setting aside the *ex parte* order is rejected, no appeal lies from the

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order of rejection. That order cannot be held to decide a question relating to the apportionment of compensation and cannot, therefore, come under section 3(*a*) of the U. P. Town Improvement (Appeals) Act.

Bhawani Prasad *v.* Secretary of State for India, I. L. R., 55 All. 153

VALUATION OF SUIT—*Suit under order XXI, rule 63—Suit for declaration of ownership of property and its non-liability to be sold in execution of a decree against another person—Valuation according to decretal amount sought to be realized, or the value of the property, whichever less—Suits Valuation Act (VII of 1887), section 11—Undervaluation—Suit decided by court of inferior jurisdiction—Whether disposal on the merits prejudicially affected thereby—Estoppel—Plaintiff urging in appellate court that suit being undervalued was tried by wrong court.*] A suit for a declaration that the plaintiffs were the owners of certain immovable properties and that these properties were not liable to be attached and sold in execution of a decree obtained by defendant No. 1 against defendant No. 2 was valued at Rs.1,342 and was accordingly filed in the court of the Munsif. This amount was the balance remaining due on the decree in execution of which the properties had been attached. Nothing was mentioned about the value of the properties, nor did the defendants raise any plea that the suit was undervalued and should have been filed in the court of the Subordinate Judge. The judgment-debtor, defendant No. 2, did not enter appearance. The suit was dismissed on the merits and the plaintiffs appealed, and in the appellate court they raised the plea that the property in question was worth Rs.20,000, the suit had been undervalued and the Munsif had no jurisdiction to try it. The appellate court found in favour of this plea and returned the plaint for presentation to the proper court. On appeal to the High Court—

Held, that in a suit like the present it is the amount of the decree sought to be realized that determines the value of the suit, where the property involved is of larger value than the amount due under the decree; but where the decretal amount is large and the market value of the property involved is smaller, it is the market value of the property that determines the value of the suit. The fact that the judgment-debtor is also impleaded in the suit, as in most cases he is impleaded *pro forma*, makes no difference in the rule. *Dwarka Das* v. *Kameshar Prasad*, I. L. R., 17 All., 69, not approved. In the present case the suit had been properly valued and filed in the proper court.

Held, also, that the mere fact that a court of inferior jurisdiction has taken cognizance of a suit on account of undervaluation is not, in itself, a ground for saying that the disposal of the suit on the merits has been prejudicially affected, within the meaning of section 11 of the Suits Valuation Act. Having regard to the object for which section 11 was enacted, the conclusion is clear that the mere fact that there has been an undervaluation, and therefore the case has been heard by a court which should not ordinarily have heard it, should not be allowed to affect the decree if there has been no prejudice in the proper trial of the case on the merits.

Held, also, that no question of estoppel against the plaintiffs arose in this case. The plaintiffs did not say in the plaint that the property involved was worth Rs.1,342. They valued their suit at that figure, which was the amount due on the decree. It was a pure question of law whether the valuation of the suit should be the market value of the property or the amount due on the decree, and there could be no estoppel on a question of law. Accordingly, the plaintiffs were not estopped from pleading in the appellate court that the true valuation of the suit was the market value of the property.

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WITNESS—*Testimony of perjured witness should be entirely discarded and not used for any purpose—Evidence—Degree of proof—Not affected by degree of gravity of the charge—Quantum of evidence—Communal riot cases—Evidence Act (I of 1872), section 134—Oath, efficacy of.*] The evidence of a witness proved to have committed perjury is of no value whatsoever and cannot be used for any purpose; that is, by itself, or to corroborate or be corroborated by truthful evidence.

There is only one standard of proof for all charges, and that is that the Crown must prove the charge beyond all reasonable doubt. The nature of the sentence cannot affect the question of proof. Where the accused was charged with murder and arson, and the evidence both on the murder charge and the arson charge was precisely the same, but the Sessions Judge thought that a lesser standard of proof might be applied to the arson charge but that a higher standard was necessary for convicting on a capital charge and inflicting an irrevocable sentence, and gave the accused the benefit of doubt in respect of the murder charge but convicted him on the arson charge, it was *held* that the benefit of the doubt should have been given on both charges.

In communal riot cases it is unsafe to convict on the evidence of one witness alone, unless there is satisfactory circumstantial evidence in addition.

The oath administered in Indian courts to Indian witnesses is of an unsatisfactory nature.

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